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IN THE

Supreme Court of the United States

October Term, 1986

PENNZOIL COMPANY,

Appellant,

—against—

TEXACO INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

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LIST OF AFFILIATES AND SUBSIDIARIES OF TEXACO INC.

The affiliates and subsidiaries of Texaco Inc. listed on its most recent Form 10-K filed with the Securities and Exchange Commission are as follows:

Getty Oil Company
Getty Pipeline, Inc.
Riverway Gas Pipeline Company
Texaco Oils Inc.
Texaco Producing Inc.
Texaco Refining and Marketing Inc.
Texaco Trading and Transportation Inc.
The Texas Pipe Line Company
Deutsche Texaco AG
Norsk Texaco Oil A/S
S. A. Texaco Belgium N.V.
S. A. Texaco Petroleum N.V.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco (Ireland) Limited
Texaco Limited
Texaco North Sea U.K. Company
Texaco Oil Aktiebolag
Texaco Petroleum Maatschappij (Nederland) B.V.
Refineria Panama S.A.
Refineria Texaco de Honduras, S.A.
Texaco Brasil S.A.-Produtos de Petroleo
Texaco Caribbean Inc.
Texaco Nigeria Limited
Texaco Panama Inc.
Texaco Petroleum Company
Texaco Trinidad, Inc.
Texas Petroleum Company
Texaco Butadiene Company

Texaco Chemical Company
Canadian Reserve Oil and Gas Ltd.
Texaco Canada Inc.
Texaco Canada Resources Ltd.
Getty Marine Corporation
Texaco International Trader Inc.
Texaco Overseas Holdings Inc.
Texaco Overseas Petroleum Company
Texaco Overseas Tankship Ltd.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Title 28, § 1343(a)(3) of the United States Code provides:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

Title 28, § 1341 of the United States Code provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Texas Civil Practice and Remedies Code § 37.006(b) provides:

> In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard.

Texas Rule of Civil Procedure 22 provides:

> **Commenced by Petition.** A civil suit in the district or county court shall be commenced by a petition filed in the office of the clerk.

Texas Rule of Civil Procedure 324(b) provides:

> **Motion for New Trial Required.** A point in a motion for new trial is a prerequisite to the following complaints on appeal:
>
> (1) A complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default;
>
> (2) A complaint of factual insufficiency of the evidence to support a jury finding;

(3) A complaint that a jury finding is against the overwhelming weight of the evidence;

(4) A complaint of inadequacy or excessiveness of the damages found by the jury; or

(5) Incurable jury argument if not otherwise ruled on by the trial court.

Texas Rule of Civil Procedure 365 provides:

(a) Sufficiency. The sufficiency of a cost or supersedeas bond or deposit or of any other bond or deposit under Rule 364 shall be reviewable by the appellate court for insufficiency of the amount or of the sureties or of the securities deposited, whether arising from initial insufficiency or from any subsequent condition which may arise affecting the sufficiency of the bond or deposit. The court in which the appeal is pending shall, upon motion showing such insufficiency, require an additional bond or deposit to be filed in and approved by the clerk of the trial court, and a certified copy to be filed in the appellate court.

(b) Excessiveness. In like manner, the appellate court may review for excessiveness the amount of the bond or deposit fixed by the trial court and may reduce the amount if found to be excessive.

Texas Rule of Civil Procedure 627 provides:

If no supersedeas bond or notice of appeal, as required of agencies exempt from filing bonds, has been filed and approved, the clerk of the court or justice of the peace shall issue the execution upon such judgment upon application of the successful party or his attorney after the expiration of thirty days from the time a final judgment is signed. If a timely motion for new trial or in arrest of judgment is filed, the clerk shall issue the execution upon the judgment on application of the party or his attorney after the expiration of thirty days from the time the order overruling the motion is signed or from the time the motion is overruled by operation of law.

Texas Rule of Civil Procedure 682 provides:

> **Sworn Petition.** No writ of injunction shall be granted unless the applicant therefor shall present his petition to the judge verified by his affidavit and containing a plain and intelligible statement of the grounds for such relief.

Texas Rule of Civil Procedure 329b is reprinted as Appendix A.

Texas Rule of Civil Procedure 364 is reprinted as Appendix B.

Other constitutional provisions, statutes and rules involved may be found in appellant's brief pursuant to Rule 34.1(f) of the Rules of this Court.

STATEMENT OF THE CASE

In its papers before the federal district court, Pennzoil protested that it "seeks only to preserve the legitimate interests of both parties" and that it "has every reason to promote the financial viability and well-being of Texaco".[1] In this Court, Pennzoil claims to be the champion of comity and "our federalism". (PB 12)[2]

Pennzoil, in fact, has had neither Texaco's interests nor comity interests at heart. It has had one interest and one interest only: to use the threat of impossible and unnecessary local security requirements to force Texaco into a settlement unrelated to the merits of the *Pennzoil v. Texaco* state court lawsuit, thereby eliminating the possibility of there ever being corrective appellate review of the Texas trial court judgment in that suit.

Pennzoil knows—indeed, the uncontroverted findings of fact below make clear:

- that application of the Texas security provisions is not necessary to protect the efficacy or collectability of Pennzoil's state court judgment;

- that invocation of those provisions—by causing the immediate evaporation of even short-term sources of financing for Texaco while at the same time greatly expanding Texaco's short-term needs for cash—would quickly drive Texaco into bankruptcy or liquidation;

- that, as a result, Texaco would be deprived of its state-guaranteed right to a meaningful appeal from the state trial court judgment—an appeal raising substantial federal and state issues;

- that the Texas security scheme itself—by deliberately removing any role for the state judiciary—provided no

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[1] Memorandum in Opposition to Texaco's Motion for a Preliminary Injunction and in Support of Pennzoil's Cross-Motion to Dissolve the TRO and Dismiss the Amended Complaint, Dec. 20, 1985, at 4.

[2] Citations in the form "PB ___" refer to pages in the Brief for Appellant in this Court. Citations in the form "A ___" refer to pages in the Appendices attached to Pennzoil's Jurisdictional Statement. Citations in the form "CCA ___" refer to pages in the Joint Appendix before the Second Circuit, a copy of which is being separately provided to this Court.

procedural avenue for Texaco to make a challenge to the security rules, and that any procedural route for making a constitutional challenge in the state courts would (at best) have had to be used in novel, unintended and wholly uncertain ways;

• that before the Texas trial court, Pennzoil made every effort—by vigorously opposing any flexible uses of procedures or emergency trial court conferences—to insure that state relief for Texaco would be either impossible or too late;

• that the result of Pennzoil's conduct was to create unrelenting uncertainty about Texaco's future, to exacerbate Texaco's financial crisis and to maximize settlement pressure on Texaco; and

• that when Texaco finally moved for emergency federal relief—with all state avenues impeded and time running out—Texaco was on the edge of destruction.

In short, far from giving state courts an opportunity to rule on Texaco's federal claim, before the Texas court Pennzoil did just the opposite. Now, in this Court—with values supportive of federal abstention at their lowest and values supportive of federal equity relief at their highest—Pennzoil contends that access to emergency federal relief should nonetheless have been barred. No decision, precedent or principle enunciated by this Court would justify such a dramatic contraction of federal jurisdiction.

The result below was supported by detailed findings of fact based on *uncontroverted* evidence. Pennzoil does not (because it cannot) point to a single finding that is inconsistent with that evidence. Nor does Pennzoil (because it cannot) attempt to reconcile those findings with its arguments to this Court. Pennzoil either ignores the findings or makes arguments that affirmatively require their reversal. Any doubt about what Pennzoil has been up to is quickly dispelled by a brief chronology of events since entry of the state court judgment. That chronology—based upon the uncontroverted record below—shows why Texaco was compelled to seek emergency federal relief and why that narrow relief was properly granted.

(a) On December 10, 1985, a trial court in Texas entered a money judgment against Texaco (the "Judgment") in the unprecedented amount of $11.12 billion (A6)—over 40 times larger than the largest private civil judgment ever upheld in any prior case of any kind.

(b) Under Tex. R. Civ. P. 364(b) and 627, a money judgment is enforceable by execution 30 days after entry (or, if a new trial motion is made, 30 days after its denial), unless the judgment debtor posts a supersedeas bond in "at least the amount of the judgment, interest and costs". (A8 & n.4, A86)[3] A bond in this minimum amount is mandated by law; Texas courts have no discretion to reduce it or stay execution without it. (A9-10, A30-31, A103)[4]

(c) Even if execution is suspended by posting the required supersedeas bond, Tex. Prop. Code Ann. §§ 52.001 *et seq.* still permit a judgment creditor to place liens upon a judgment debtor's real property in Texas immediately upon entry of judgment. (A86-87; *see also* A25-26, A8-9) There is no authority under Texas law for staying attachment of such judgment liens.[5]

(d) Under the bond provisions, to obtain a stay of execution of the Judgment pending appeal, Texaco would have had to post a bond in excess of $12 billion. (A8) No company could have posted such a bond, since "the world-wide surety bond capacity ranges from $1 billion to $1.5 billion under the best possible circumstances". (A9)[6]

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[3] Effective September 1, 1986, all Texas rules of civil and criminal procedure affecting appeals were recodified as the Rules of Appellate Procedure. Citations herein are to the Rules of Civil Procedure in effect as of December 1985.

[4] If a supersedeas bond is not posted, a writ of execution is obtained by *ex parte* application to the court clerk, the writ is presented by the judgment creditor to the county sheriff, and the sheriff executes it. (A25-26)

[5] Judgment liens are obtained by *ex parte* application to the court clerk, who furnishes an abstract of judgment which the judgment creditor delivers to county recorders in counties where the judgment debtor's real property is located. The county recorders then index and file the abstract, thereby perfecting the lien. (A25-26, A84-85) Pennzoil suggests that judgment liens are permitted only if a supersedeas bond is not posted. (PB 2) That is not correct. A judgment creditor can place liens upon a judgment debtor's property regardless of whether a supersedeas bond has been posted and even if security for the judgment is not needed. (A86-87)

[6] Similarly, although Texaco had a liquidation value in excess of $22 billion (A39), it could not possibly have posted $12 billion in cash or cash

(e) If no supersedeas bond was posted, Pennzoil could have executed the Judgment, thereby effectively dismantling Texaco. Even with a supersedeas bond, the attachment of liens on Texaco's real property in Texas, valued at $5 billion, would "seal the company's fate", forcing Texaco into bankruptcy or liquidation. (A39-40, A98)[7] As a result, Texaco's ability to pursue an effective state court appeal from the Judgment—an appeal guaranteed by the Texas Constitution and raising non-frivolous federal and state issues (A42)—would have been destroyed. The damage to Texaco would have been "immeasurable, irrevocable, and irremediable by reversal of the judgment on the merits". (A44)

(f) Application of the lien and bond provisions would also have adversely affected the national economy and national security.[8] The extent of the public harm threatened by premature enforcement of the Judgment was attested by the fact that in the court below "some 58 interested parties including 12 states . . . filed amicus briefs or other papers urging that enforcement be enjoined". (A40)

(g) Upon the consent of both parties, Paragraph 7 was inserted into the Judgment, barring Pennzoil from enforcing the Judgment for the limited time the trial court retained jurisdiction, so long as Texaco satisfied certain conditions.[9]

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equivalents and "still retain sufficient liquid assets to operate its business" (A9; *see also* A39-40); nor, because of the terms of its unsubordinated indebtedness, could it have possibly borrowed $12 billion by mortgaging or pledging its assets (A9).

[7] The attachment of liens would have been particularly devastating to Texaco, because it would have triggered default and cross default provisions in approximately $1.74 billion of unsecured long-term debt, thereby rendering Texaco "unable to obtain additional credit while requiring it to raise $1.74 billion (on top of all its other cash needs) to pay the accelerated indebtedness". (A98)

[8] If Texaco had been forced into liquidation or bankruptcy, a large percentage of Texaco's 55,000 employees world-wide, with an annual payroll of $1.6 billion, would have lost their jobs; and approximately 319,000 Texaco stockholders, who received $730 million in dividends in 1985, would have suffered heavy losses. (A40) In addition, "the inability of Texaco to function in a normal manner" could "adversely affect this country's balance of payments", make "this country's oil supply less secure", impair the "ability to supply military forces" around the world, and "prompt" other foreign actions "harmful to the national security or foreign policy of the United States". (A112-13)

[9] If Texaco took the full 30 days from entry of judgment allowed by Texas law to file a new trial motion, the expiration of the trial court's

Pennzoil refused to agree to further relief and took the position (correct under Texas law) that the court was powerless to give any relief without Pennzoil's consent. (A7, A8, A103)

(h) Despite Paragraph 7, in the week after entry of the Judgment, Texaco's financial condition rapidly deteriorated, driving the company to the brink of bankruptcy. (A10, A90-98)[10] Texaco's bonds were downgraded by Moody's from investment grade to non-investment grade; Texaco was forced to withdraw from the commercial paper market; banks with which it did business advised that they would no longer lend the company money on unsecured terms; potential joint venturers with Texaco cancelled negotiations; suppliers refused to do business with the company on regular and customary terms; companies refused to negotiate routine deals for the purchase of Texaco assets; and Texaco's ability to obtain crude oil—"the lifeblood of Texaco's operations"(A95)—was jeopardized. At the very time that Texaco's access even to short-term financing was being cut off, its short-term need for cash was substantially increased. (A40, A95; *see* A10)

(i) Because of the severity of Texaco's financial crisis, on December 13, 1985, Texaco co-counsel wrote to the Texas

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jurisdiction (and, thus, of Paragraph 7's terms) could have occurred at the earliest on February 8, 1986, and at the latest on March 25, 1986. (A89)

[10] For at least two reasons, Paragraph 7 failed to stop Texaco's financial deterioration. *First*, lenders and suppliers knew that Paragraph 7 would expire in an indefinite, but under any circumstances short, period of time, after which Pennzoil could attach or execute on Texaco's property. (A10, A88-90) Because most credit and supply transactions could not be completed within the time period covered by Paragraph 7, lenders refused to advance even short-term financing and suppliers reversed long-standing trade creditor relationships by insisting upon advance payment in cash (or by letter of credit) as a condition of doing business. (A93-95) *Second*, there was reluctance to deal with Texaco because of uncertainty over whether particular transactions were permitted under Paragraph 7, which, *inter alia*, prohibited Texaco from engaging in transactions other than "in the routine and ordinary course of business". (A90, A97-98)

Pennzoil itself aggravated the situation by publicly threatening to undo whatever limited protection Paragraph 7 afforded. Specifically, Pennzoil's chairman warned that the company was " 'going to put pressure' " on the Texas trial court to permit attachment of liens unless Pennzoil was satisfied with Texaco's settlement proposals, and a Pennzoil director and "legal strategist" charged Texaco with violating the "standstill" provisions of Paragraph 7 "by providing letters of credit from its bankers in purchasing products and services"—a clear threat to have the "standstill" lifted. (A105; *see* A46)

trial court urgently requesting a conference. (A101) The trial court immediately responded, suggesting three alternative dates "subject to agreement of all counsel". (A102) The next day, however, Pennzoil counsel informed Texaco that Pennzoil would not agree to a conference on any of the three dates suggested by the trial court—"or at any other time". (A102)

(j) In response to Pennzoil's refusal, Texaco immediately renewed its request to the Texas trial court. (A102) Two days later—on December 16, 1985—Pennzoil counsel wrote to the trial court, opposing a conference and urging that "any suggested hearing as requested by Texaco" be "considered a motion under Rule 329b" and "be held in an orderly manner when Texaco is ready to proceed on its motion for a new trial". (CCA00849-50)[11]

(k) On December 17, 1985, Texaco co-counsel received a letter from the Texas trial court stating that co-counsel was not an " 'attorney of record' " for Texaco; that his prior requests for a conference had been improper " 'ex parte communication[s]' " on which the trial court would not act; and that the court would insist upon "compliance with the

[11] Pennzoil surely appreciated that requiring strict compliance with local procedural rules and precluding Texaco from a conference with the Texas trial court (where a further agreement between the parties might have informally been worked out) made Texaco's ability to secure relief from application of the lien and bond provisions in the pending proceeding at best gravely uncertain and at worst impossible. *First*, the security scheme itself provided for no process whatever by which Texaco could have asked for judicial review of the security requirements. *See infra* at 25.

Second, a route for making a constitutional challenge in the pending proceeding was highly doubtful, if not completely unavailable. That is because: (a) there is no precedent in Texas which would have allowed such a challenge, upon entry of the Judgment, to be made by motion or other pleading in the pending proceeding, as opposed to by an original injunction action commenced by filing a verified petition; and (b) it is a prerequisite to a constitutional challenge that the Texas Attorney General be given notice and an opportunity to be heard, and there was no way to know beforehand whether the Attorney General would request intervention and, if so, whether the trial court—in view of its ostensible lack of power, upon entry of the Judgment, to permit intervention—would therefore preclude Texaco's challenge. *See infra* at n.72.

Third, if, despite the above, Texaco had opted for the novel and uncertain route of attempting to raise a constitutional challenge to collateral security provisions by motion for new trial, it still would have confronted an intolerable choice: either (a) making the new trial motion precipitously,

(Footnote Continued)

'Texas Rules of Court' as to the types of motions that can *now* be filed, together with adherence to the rules as to *notices* and *requests for hearings* thereon". (CCA00852; emphasis added) The first two of those statements were wrong—and, that very day, Texaco so advised the trial court;[12] the last indicated that the trial court had adopted the position urged by Pennzoil on December 16. It was only then, with "time . . . of the essence" (A35), that Texaco moved for emergency injunctive relief in the federal court.

(1) Against the devastation which would have been caused to Texaco without such relief, application of the lien and bond provisions was wholly unnecessary to protect any legitimate Pennzoil interest. As the Second Circuit observed, "there is no serious dispute that, should Texaco be required to liquidate its substantial assets, it would be able to pay Pennzoil's judgment in full". (A45-46; *see also* A47-48)[13]

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despite its considerable substantive complexity and importance (normally, a litigant has 30 days to make a new trial motion and most error not identified therein is waived (Tex. R. Civ. P. 324(b), 329b)); or (b) spending the requisite time preparing the motion, which would have delayed judicial action for days, if not weeks—"precious time" (A37) that Texaco did not have. *See infra* at n.72.

It is instructive in retrospect, moreover, that when Texaco did make its new trial motion, the trial court (after unsuccessfully attempting to coerce Texaco to waive a challenge to its qualifications) simply refused to hold a hearing or make any ruling, allowing the motion to be denied by operation of law 75 days after entry of the Judgment. Thus, whatever course Texaco chose, it would in the event have led up a blind alley.

[12] The particular Texaco co-counsel in question *was* an attorney of record for Texaco, had filed a formal notice of appearance, had participated in earlier proceedings before the Texas trial court and had even personally signed the Judgment at the trial court's request. Further, the Texaco letters to the trial court were not *ex parte* communications, but had been contemporaneously delivered to all counsel—and expressly so indicated. Finally, in Texaco counsel's experience, "under Texas practice" requests for conferences were "often made in letter form with copies to all counsel". (CCA00854-55) The trial court *never* responded to Texaco's letter and *never* scheduled a conference as requested by Texaco. (A103; *see* A10)

[13] Texaco's appraised net worth as of December 31, 1984, was in excess of $22.6 billion; Pennzoil itself estimated that Texaco had assets far greater than necessary to satisfy the Judgment; Pennzoil's chairman publicly conceded that " 'he did not doubt Texaco's ability to pay the damages' "; and there was "no evidence that Texaco, a publicly held corporation, would seek to encumber its property other than as would be necessary in the ordinary course of business or that it would transfer any of its assets to defraud Pennzoil". (A46-47)

(Footnote Continued)

(m) Given Pennzoil's conceded lack of need for security and the non-frivolous questions raised by Texaco's state court appeal, the Second Circuit was moved to observe that Pennzoil's "pressure to apply the Texas lien and supersedeas bond requirements may, as Texaco charges, be motivated more by Pennzoil's understandable desire to obtain a favorable settlement of the Texas action than by genuine concerns about possible inability to collect if its judgment should be affirmed on appeal". (A46)

SUMMARY OF ARGUMENT

Section 1983 has a limited—but necessary—function as a safety valve "to prevent great, immediate and irreparable loss of a person's constitutional rights".[14] This case illustrates that function. The federal injunction affirmed by the Second Circuit was an emergency measure to prevent extraordinary irreparable injury—the bankruptcy or liquidation of one of the world's major corporations—that would have resulted from the unconstitutional application of Texas' security provisions, where no procedural route in the Texas courts could plausibly have provided the timely relief Texaco desperately needed. Far from creating "a capacious zone within which comity is simply inapplicable" (PB 9) or sanctioning a "deliberate bypass" of local procedures (PB 10), the decision below falls well within doctrines previously enunciated by this Court. Pennzoil's contrary portrayal is wrong on every point.

In Reply to Texaco's Motion to Affirm, June 10, 1986, Pennzoil complained that the basis of the lower court's finding of lack of need was "uniformly citations to hearsay newspaper reports of statements attributed to Pennzoil officials or attorneys". (Reply Brief at 4 n.6) In the first place, the lower court's findings were based, not on hearsay, but on affidavits and admissions. (*See* A47; CCA00873-75) Pennzoil never contested the accuracy of that evidence during the district court proceedings, never challenged the adequacy of the $1 billion bond set by the district court and never sought to avail itself of the procedures explicitly established by that court (and approved by the Second Circuit) to increase security if circumstances change (*see* A53-55). Moreover, one month *after* probable jurisdiction had been noted in this case, Pennzoil reiterated its lack of need for interim security—this time in a formal pleading filed with the Texas Court of Appeals which represented that "the judgment can be satisfied through transfer of assets in a manner that would not affect Texaco's economic viability, given its vast resources". (Reply of Appellee Pennzoil Company to Various Amicus Briefs, July 24, 1986, at 3)

[14] *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

First, Texaco did not seek—and the court below did not sanction—a constitutional requirement of "an affordable means of staying execution" of a judgment pending appeal. (PB 6) The Second Circuit ruled that where interim security provisions are impossible for a judgment debtor to satisfy and are unnecessary to protect any legitimate interest of a judgment creditor, and where they thereby totally subvert meaningful access to appellate review, then application of those security provisions lacks any rational basis and violates the Due Process Clause. Pennzoil cites no case to the contrary.[15]

Second, Texaco did not seek—and the court below did not sanction—a rule which, for Section 1983 purposes, has the effect of "transforming *every* state-court judgment winner who seeks enforcement into 'the state' ". (PB 13; emphasis in original) State action is involved here not because Pennzoil "won" in the Texas trial court, but because Texas, by its security scheme, has ceded to Pennzoil unsupervised power over ministerial state officials which can be used, prior to final adjudication of its claims, to aid in the seizure and sale of Texaco's property—property that remains very much in dispute.[16]

Third, Texaco did not seek—and the court below did not sanction—interference with any on-going state court proceeding, and certainly not interference with a state court proceeding in which Texas has a "vital" or "important" interest sufficient to justify abstention under *Younger v. Harris*, 401 U.S. 37 (1971). By deliberately eliminating judicial supervision over the lien

[15] The Second Circuit's "as applied" holding does not affect the *facial* validity of the Texas security scheme; does not even remotely suggest that the Fourteenth Amendment categorically prohibits mandatory full-bonding statutes; and does not require Texas "'to provide for a prior individualized hearing each and every time the provisions' of [its] scheme adversely affect a given party" (PB 49). Nor, where a state has enacted a non-discretionary full-bonding scheme, does the Second Circuit's ruling authorize the federal courts to make the type of wide-ranging inquiry that can be made under discretionary bonding rules.

[16] Nothing done below would convert a litigant into a "state actor" merely because of his "invocation of state judicial proceedings" (PB 16); indeed, the Second Circuit's state action holding depends importantly upon the fact that *no* judicial process relating to security can be invoked in Texas. Nor would anything done below make a "state actor" out of a litigant who invokes state enforcement mechanisms *after* a judgment becomes final, upon exhaustion of all appeals, when the property at issue is no longer in dispute.

and bond provisions, the State of Texas itself guaranteed that there could be no state judicial process here of the type which has been a prerequisite for abstention in every *Younger* case.[17] As Pennzoil would have it, the comity that *Younger* accords independent state enforcement and adjudicative officials should be accorded here to a purely private litigant controlling public power for purely private purposes. No *Younger* case supports such a result.

Fourth, Texaco did not seek—and the court below did not sanction—a result which constitutes or requires review of Pennzoil's Judgment or which ousts the Texas appellate courts from their unfettered ability to rule on the merits of the *Pennzoil v. Texaco* lawsuit.[18] Texaco's due process challenge to the lien and bond provisions turns on considerations wholly apart from the merits of that lawsuit. Nor could Texaco's challenge place the efficacy or collectability of the Judgment in doubt, dependent as the challenge is upon Pennzoil's conceded lack of need for security.

Fifth, the present action was filed in response to the threat of immediate and irreparable harm to Texaco (and to the public interest) which could not have been averted by "adequate and timely" state court remedies. (A37) Even at this late date, Pennzoil itself is unable to identify any procedural avenue available to Texaco in the Texas state courts, free from grave uncertainty regarding its utility for raising and having timely resolved the type of constitutional claim that Texaco brought below. Rather, Pennzoil contends that Texaco was required to bear the risk of uncertainty, where all identifiable state court routes would have had to be used in novel and unintended ways, where Pennzoil itself was vigorously opposing anything

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[17] The only judicial proceeding that is pending in Texas—the proceeding on the merits of Pennzoil's claim against Texaco—is a purely private dispute involving purely private parties, and the State of Texas expressly represented in the court below that it has "no interest in the outcome" of that dispute. (Brief of the State of Texas, Intervenor-Appellant, Jan. 23, 1986 ("Tex. Br."), at 2) Moreover, Texas, whose security provisions are at issue, intervened as a party in the district court pursuant to 28 U.S.C. § 2403(b), and separately appealed to the Second Circuit (A4 n.1), but is neither an appellant nor a participant in this Court. *See Diamond v. Charles*, 106 S. Ct. 1697, 1702-04 (1986).

[18] Texaco's state court appeal from the Judgment is moving forward right now. The appeal was argued and submitted to the Texas Court of Appeals on July 31, 1986, and is currently *sub judice*.

but strict adherence to the letter of the rules, and where a single incorrect choice by Texaco would have had disastrous consequences (both to Texaco and to the nation as a whole). There is no doctrine—and Pennzoil identifies none—which, in the face of such exigent circumstances, would support the wholesale abdication of federal jurisdiction that Pennzoil now urges. Nor should there be.

ARGUMENT

I. THE SECOND CIRCUIT CORRECTLY HELD THAT APPLICATION OF THE LIEN AND BOND PROVISIONS WOULD VIOLATE DUE PROCESS.

According to Pennzoil, the Second Circuit ruled that "the Due Process Clause entitles a civil judgment debtor . . . to an affordable means of staying execution of the judgment against it while pursuing its appeal". (PB 6) Nothing could be farther from the truth. The Second Circuit's "narrow holding" was carefully limited to a situation where the *undisputed* facts demonstrate: (a) that posting a mandatory $12 billion bond would be "impossible" not just for Texaco, but for any judgment debtor (A35); (b) that "inflexible" adherence to a state's non-discretionary lien and bond provisions by a judgment creditor vested with state power would render the judgment debtor's guaranteed right to appeal "an exercise in futility"—a "meaningless ritual"—by "irrevocabl[y]" destroying the judgment debtor prior to appellate review (A24, A44); and (c) that imposition of security would be "unnecessary" to protect the judgment creditor pending appeal (A44-46). It was on those undisputed facts that the Second Circuit concluded that application of the lien and bond provisions "lacks any rational basis". (A24)

Pennzoil does not—and cannot—dispute any of the factual predicates for that holding.[19] The Second Circuit's due process ruling follows from them inexorably.

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[19] Incredibly, however, Pennzoil asserts that if Texaco is dismantled through liquidation or bankruptcy, its property would not be destroyed, but "merely transferred to new owners". (PB 32 n.26) Pennzoil overlooks the fact—as this Court recognized in *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975)—that the destructive impact of bankruptcy constitutes irreparable injury since it "might well" render "a favorable final judgment useless".

This Court has consistently held that once a state creates adjudicative processes for resolution of claims by private citizens, access to those adjudicative processes cannot be limited, conditioned or withdrawn without comporting with due process requirements.[20] Specifically, in *Evitts v. Lucey*, 469 U.S. 387 (1985), this Court held that, having established an appellate system, a state must "act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause"—so as to assure that appellate access is not rendered "a meaningless ritual".[21]

Acknowledging *Evitts'* teaching, Pennzoil concedes, as it must, that the Due Process Clause "prohibit[s] states from imposing *irrational or arbitrary requirements* on the appellate opportunities they choose to make available". (PB 45; emphasis added) Yet Pennzoil fails to explain why application of the lien and bond provisions *in the circumstances of this case* would not, by destroying Texaco, irrationally deprive it of its right to a meaningful appeal—an appeal "clear[ly]" raising "non-frivolous" federal and state issues (A42).[22] Indeed, given the *undisputed* finding below—that application of the Texas security provisions would be *both* destructive of Texaco *and* unnecessary to protect Pennzoil during the appellate process (A44-

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[20] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 426-27, 430 n.5, 431-33 (1982) (relying on "cases involving access to courts"); *see id.* at 444 (Powell, J., concurring in the judgment: "I agree that the challenged statute as construed and applied in this case, failed to comport with this minimum [rationality] standard").

[21] 469 U.S. at 393-94, 401. In so ruling, the Court flatly rejected the contention that because a state "need not establish a system of appeals as of right in the first instance, it is immune from all constitutional scrutiny when it chooses to have such a system". *Id.* at 400. As *Evitts* declared, "[t]he right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms". *Id.* at 400-01.

[22] The "non-frivolous issues" identified by the Second Circuit included (a) whether disqualification or a mistrial should have been declared after the first judge assigned to the case accepted "a '$10,000 campaign contribution'" from Pennzoil's lead trial counsel "without disclosure to Texaco", (b) whether the successor judge misapplied governing law with respect to the contract, tort and punitive damages issues, (c) whether the alleged Pennzoil-Getty contract "was void and unenforceable", *inter alia*, as violative of SEC Rule 10b-13, (d) whether "an improper method was used" to compute compensatory damages, and (e) whether the Judgment violated, *inter alia*, the Commerce and Supremacy Clauses of the United States Constitution. (A42)

(Footnote Continued)

47)—the evisceration of Texaco's appellate rights does not even pass "the test of minimum rationality" (PB 49).[23]

In an attempt to avoid this conclusion, Pennzoil makes several arguments. None has merit.

First, Pennzoil contends that "Texas has not . . . limited Texaco's appeal rights as such" because compliance with the supersedeas bond requirement is not a prerequisite to prosecution of an appeal in Texas. (PB 45-46) That, of course, exalts form over substance. As the court below found, on an undisputed factual record, the operation of the lien and bond provisions in this case would irrevocably destroy Texaco pending appeal and thus "render its right to appeal in Texas an exercise in futility" (A24)—a "meaningless ritual", having been "robbed of any effectiveness". (A43-44, A50-51)

Second, Pennzoil contends that there is "nothing in the least 'irrational' in a decision to favor the security interests of Pennzoil as a victorious plaintiff over those of Texaco as a judgment debtor". (PB 46) But where a "victorious plaintiff" (such as Pennzoil here) has no need for security, it can have no "security interests" to "favor"; and where, at the same time, a "judgment debtor" (like Texaco here) will be destroyed by "favor[ing]" those non-existent "security interests", the

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The Second Circuit's conclusion that those issues are "non-frivolous" was not, as Pennzoil suggests (PB 42 & n.40), a ruling on the merits of Texaco's state court appeal (or even a comment about the appeal's likely outcome). *See infra* at 47-48 & n.101. It was part of the Second Circuit's assessment of whether there was a showing of irreparable harm to Texaco sufficient to justify a preliminary injunction under Second Circuit standards. As the Second Circuit explained:

> "[O]nly if Texaco's appeal were patently frivolous would we be justified in holding that any threatened harm to it from effective denial of its right to appeal could be labelled inconsequential. The issue before us, therefore, is *not whether Texaco should have prevailed on the merits in the Texas action but whether its Texas appeal presents non-frivolous issues for resolution.*" (A41; emphasis added)

[23] Pennzoil overlooks the latter limiting aspect of the Second Circuit's ruling (*i.e.*, lack of need for security) in arguing that there is no "principled" distinction between this case and "ordinary cases of judgment debtors unable to post bonds". (PB 34) Unlike Pennzoil, the court in *Oaks v. District Court of the State of Rhode Island*, 631 F. Supp. 538 (D.R.I. 1986), was readily able to perceive that limitation as a meaningful distinction. 631 F. Supp. at 548 (while the Second Circuit observed that Texaco "could nonetheless be expected to satisfy the judgment if its merits appeal failed", "[n]o such assurance can credibly be proffered in the case at bar").

irrationality of applying state security provisions designed for other circumstances is clear. States such as Texas provide access to appellate courts precisely because they recognize that trial court adjudication carries a "risk of an erroneous deprivation".[24] Surely, no rational being would deliberately design a procedure for the interim and unnecessary enforcement of a possibly erroneous trial court judgment that would irrevocably destroy the appellant before the appellate courts had the opportunity to resolve its appeal.[25]

Third, Pennzoil contends that due process is fully satisfied by the adoption of a "general rule" which "presumptively . . . prefer[s] (1) full protection for the winning party against the risk of partial or complete uncollectability should the trial judgment ultimately be affirmed, over (2) full protection for the losing party against the risk of interim harm that may prove impossible to undo in its entirety should the trial judgment

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[24] *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). It should be noted in this connection that both the State of New York and the State of Delaware have taken the highly unusual step of filing *amicus* briefs in the intermediate Texas appellate court urging reversal of the Judgment on the ground that it was the product of a misapplication of the law of their respective jurisdictions—New York law governing the contract, tort and damages issues; and Delaware law governing the fiduciary duty of the Getty Oil board of directors.

[25] The difference between the instant situation and the two cases on which Pennzoil relies is manifest. In *National Union of Marine Cooks and Stewards v. Arnold*, 348 U.S. 37 (1954) (PB 20 n.8, 48-49 & n.45), this Court assessed whether due process allowed dismissal of an appeal from a $475,000 judgment where the appellant had repeatedly flouted court orders that he deliver $298,000 of out-of-state assets to a receiver for safekeeping pending appeal—the *only* substantial assets the appellant owned. 348 U.S. at 38-39. In sustaining the dismissal, this Court held that where collectability of a judgment "is jeopardized by the judgment debtor, he has no constitutional right to an appeal extending that frustration". *Id.* at 44. That has nothing to do with this case, where there is a lack of need for security pending appeal, where there has been no misconduct or flouting of judicial orders by the state court appellant and where there is no evidence that Texaco would unreasonably encumber or fraudulently transfer its assets during the appellate process. (A47)

Equally misplaced is Pennzoil's reliance on *Louisville & Nashville R.R. Co. v. Stewart*, 241 U.S. 261 (1916). (PB 48-49) There, this Court held that a state could add 10% to the amount of a judgment *if affirmed on appeal* as the cost of the judgment debtor's obtaining a supersedeas bond which suspended execution pending appeal. *Id.* at 263. Because there was no claim in *Stewart*, nor could there have been, that this requirement effectively rendered the defendant's appeal meaningless, that case does not even remotely resemble the instant one.

ultimately be reversed". (PB 46)[26] In effect, Pennzoil is asserting that so long as the Texas lien and bond provisions are not *facially* improper under the Due Process Clause, they can never be improper *as applied*.

Pennzoil's argument is contrary to this Court's holding in *Evitts* that once a right to appellate access is granted, the state must "offer *each* defendant a fair opportunity to obtain an adjudication of *his* appeal".[27] In other words, each individual has a due process right to be free of irrational impediments to meaningful appellate access and cannot be deprived of that right simply because the challenged state scheme might be reasonable in its general application.

Pennzoil's argument is also contrary to this Court's express acknowledgement in *Lindsey v. Normet*, 405 U.S. 56, 65 (1972), that a single bond requirement, valid on its face, might nevertheless be unconstitutional as "applied . . . in specific situations".[28] Indeed, this Court recently reiterated that "as applied" adjudication is the "preferred course" of constitutional decisionmaking, "since it enables courts to avoid making unnecessarily broad constitutional judgments".[29] Thus, Pennzoil misses the point by relying on cases such as *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (PB 49), which sustain the *facial* validity of state statutory schemes.[30]

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[26] Pennzoil's characterization of the Texas scheme as creating a "presumption" in favor of trial winners is, of course, wrong. Rather than creating a "presumption", Texas has legislated a mandatory rule that applies, without deviation or discretion, in *all* cases.

[27] 469 U.S. at 405 (emphasis added).

[28] *See Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) ("a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question").

[29] *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3258 (1985); *see id.* at 3259 ("[b]ecause in our view the record does not reveal *any rational basis* for believing that the Featherston home would pose any threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid *as applied* in this case") (emphasis added). *See also Parham v. J. R.*, 442 U.S. 584, 616-17 (1978); *Gagnon v. Scarpelli*, 411 U.S. 778, 790-91 (1973).

[30] *See id.* at 113 (Blackmun, J., concurring) ("We are concerned here, basically, only with the facial constitutionality of certain provisions of the California Automobile Franchise Act . . .; we are not confronted with any issue of constitutionality of the Act as applied").

The decision below, limited to application of the Texas security provisions to the particular facts of this case, does *not* "countermand" the general state policy choice underlying the adoption of those provisions; nor does it "compel" Texas to opt for a "general rule" more accommodating to the interests of judgment debtors. (*See* PB 47, 48) Nothing done below would preclude a state from adopting a non-discretionary, full-judgment security scheme. Nor, where a state has enacted such a security scheme, would the Second Circuit's result allow the federal courts to provide the judicial discretion the state has opted against—by conducting broad-ranging equity hearings every time a judgment debtor feels inconvenienced.[31]

Rather, the lower court adopted a bright line test for determining when application of such a scheme is *constitutionally* infirm: the Due Process Clause comes into play when—and only when—there is *both* lack of need *and* irreparable injury of such severe magnitude as to jeopardize the right to a meaningful appeal. For it is only in that rare case—where full security is not necessary and would involve destruction of the litigant required to post it—that inflexible application of a non-discretionary, full-judgment security scheme will fail the constitutional test.[32]

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[31] Pennzoil asserts that "the law in 11 states in addition to Texas requires the posting of a full bond". (PB 47 n.44) None of those states has suggested that the Second Circuit's result puts its scheme in jeopardy. Indeed, six of the states have, by letter to the parties, indicated their intent to appear as amici in this Court in support of the preliminary injunction against Pennzoil (Alabama, Delaware, Louisiana, Minnesota, New Mexico and Oklahoma). (*See* Letter of October 30, 1986, from Robert Stephan To Counsel of Record for Both Parties)

[32] Given the "obviously . . . narrow" reach of the ruling below, the Second Circuit correctly observed that the result will have no greater effect on state supersedeas requirements than the Fifth Circuit's similarly "narrow" decision seven years ago in *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291, 301 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). (A51) There, the Fifth Circuit held that where a state court tort judgment, if erroneous, would impair serious federal interests, it was impermissible for the state to block otherwise available channels of corrective review. The court sustained an injunction against application of local security provisions which would have deprived the state court defendant of a meaningful opportunity to challenge the state court judgment on appeal. Ultimately, this Court struck down, as applied, the local substantive law at issue on the ground that it impermissibly burdened federally protected conduct. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

(Footnote Continued)

For the same reasons, it is true—but irrelevant—that, as Pennzoil asserts, " '[o]nce having enacted a reasonable general scheme . . . [a state] [i]s not required to provide for a prior individualized hearing each and every time the provisions' of the scheme adversely affect a given party". (PB 49; brackets in original; citations omitted) That assertion merely supports the conclusion that it is not *facially* unconstitutional to promulgate a security scheme which operates automatically, without judicial supervision or individual tailoring, to require full security in every case. It does not support the conclusion that such a scheme, when *applied* to impose full security that is neither necessary nor possible to satisfy, will accord with due process. And *that* narrow proposition is what this case is about.

II. The Second Circuit Correctly Held That Pennzoil Was A State Actor.

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), this Court held that state action exists in a Section 1983 suit against a private party when (a) a procedural scheme created by statute (b) is challenged as permitting an unconstitutional deprivation of rights (c) caused by the expressly authorized conduct of the private party (d) who, under the scheme, directs and acts jointly with ministerial state officials to encumber the federal plaintiff's property. There is no dispute here that (a) the lien and bond provisions are the products of state action, (b) Texaco's due process claim attacks the constitutionality of those provisions as applied, (c) Pennzoil's threatened conduct is expressly authorized by the provisions, and (d) if invoked, the provisions would have allowed Pennzoil to direct and act jointly with ministerial state officials not only to encumber Texaco's property, but to seize and sell it. Accordingly, the Second Circuit correctly held that *Lugar* compels a finding of state action in this Section 1983 case.

Like *Henry*, the present case involves a judgment that, Texaco argues on appeal in Texas, will punish and deter conduct that federal constitutional and statutory law protects and encourages. Here, as in *Henry*, local lien and bond provisions threatened immediately to make that deterrent effect permanent and irrevocable by precluding Texaco from a meaningful opportunity to raise those serious federal issues in the state appellate courts (and, if necessary, in this Court).

Despite *Lugar's* clear applicability, Pennzoil contends that the Second Circuit erred by treating Pennzoil as a state actor.[33] Pennzoil concedes that Texaco could have properly invoked Section 1983 against the state officials whose conduct Pennzoil controls, but claims that such a suit against Pennzoil itself is nevertheless improper. According to Pennzoil, by permitting that result, the Second Circuit (a) "radically expands" *Lugar* (PB 13); and (b) "drastically erodes the force of the Anti-Injunction Act" (PB 15). Both contentions lack merit.

A. The Second Circuit's Decision Is Well Within *Lugar*.

Pennzoil argues that the Second Circuit expanded *Lugar* because *Lugar* involved security rules that operated pending resolution through *trial* of competing claims to disputed property, whereas the security provisions here operate pending resolution of such claims through *appeal*. (PB 13) To support its argument, Pennzoil asserts that *Lugar* turned on three elements which, according to Pennzoil, are unique to the prejudgment context. In fact, each element is present here as well.

First, Pennzoil stresses that the security procedures in *Lugar* allowed seizure of "*disputed* property". (PB 13; emphasis in original) That is no less true here. The state's decision to provide a process of appellate review—a decision that contemplates the need to correct error committed in the initial phase of adjudication—demonstrates that a live and important "dispute" continues between the parties.[34]

Second, Pennzoil stresses that invocation of the security procedures in *Lugar* was "judicially *un*supervised". (PB 13; emphasis in original) That is also true here. Texas law prevents trial courts from exercising any discretion or supervisory power over invocation of the lien and bond provisions pending appeal. It is precisely because the State of Texas has severed the security issue from pending judicial process that trial winners (such as Pennzoil) who lack need for security may nonetheless

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[33] Significantly, Pennzoil did not see fit even to argue the state action issue before the district court.

[34] It is for that reason that Texas courts attribute to post-trial security procedures the underlying purpose of maintaining "the status quo"—a purpose not served under the facts of this case. *Renger v. Jeffrey*, 143 Tex. 73, 182 S.W.2d 701, 702 (1944).

employ security provisions to exert settlement pressure on trial losers (such as Texaco) by threatening to destroy them pending corrective review.[35]

Citing *Dennis v. Sparks*, 449 U.S. 24, 28 (1980), Pennzoil contends that the Texas security procedures would not have been "judicially *un*supervised" in this case, because (1) attachment and execution would have come at the end of a "4-½ month trial that . . . involved 'the independent judgment of the state judiciary' "; (2) "the decision presumptively to require [full] security for all [money] judgments was made by the Texas Legislature when it enacted § 52.001 and the Texas Supreme Court when it promulgated Rule 364"; and (3) "the decision whether to require full security on these facts would be made by the Texas courts upon Texaco's timely request". (PB 14-15) None of those assertions supports the conclusion Pennzoil urges.

The "independent judgment of the state judiciary" that was exercised during the "4-½ month trial" was confined to adjudicating the merits of Pennzoil's state law claim. That "independent judgment" did not address the question whether security which is both unnecessary and impossible to satisfy should be required pending appeal. It is that *latter* decision which Pennzoil controls; and it is *only* with respect to its control of that latter decision (not with respect to the "independent judgment" exercised by the state judiciary during the "4-½ month trial") that Pennzoil is deemed a state actor.

The claim that the Texas legislature and Supreme Court "*presumptively* require" full security is factually incorrect. Texas has created an *absolute* rule that full security shall *always* be

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[35] In fact, the Texas security procedures at issue in the instant case allow far *less* judicial supervision than the Virginia procedures at issue in *Lugar*. As this Court observed, under the Virginia statute, upon the *ex parte* filing of an affidavit alleging need, the petitioner's property was "sequestered . . . although it was left in his possession", and "a hearing on the propriety of the attachment and levy was later conducted". 457 U.S. at 924-25. The attachment would be vacated by the state court upon a failure "to establish the statutory grounds for attachment". *Id.* at 925. In contrast, the Texas security procedures relating to money judgments make *no* provision for *any* pre-attachment showing of need, for *any* judicial review of need—either before attachment or after—or for *any* possibility of judicial vacatur upon a failure to establish need.

required. No presumptions are involved; no adjustment is permitted.[36]

The assertion that the Texas courts can determine whether to require full security is (again) factually incorrect: under the lien and bond provisions, state courts can exercise no such discretion. Alternatively, if Pennzoil is suggesting that in an original action a state court could assess the constitutional propriety of requiring full security in the present circumstances, that is irrelevant to the state action inquiry.[37]

Third, Pennzoil stresses that seizure of property prior to initial resolution of competing claims thereto involves the exercise of "unbridled" power which should be subject to federal constitutional constraints. (PB 13) But the power, through the unsupervised seizure of property, to preclude the meaningful appellate review that ultimately will determine the property's rightful ownership—the power at issue here—is no less deserving of constitutional limitation. Where the state has ceded to a private litigant public power that can be used to control an adversary's access to meaningful appellate review, the danger is especially acute that purely private incentives will lead to abuse of that power.

The presence here of all elements that Pennzoil contends were essential to *Lugar* brings this case well within the scope of that decision. The presence of those elements also demon-

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[36] Thus, Pennzoil is wrong in contending that the Second Circuit "completely and artificially sever[ed] the issue of arranging security pending appeal from the judicial process culminating in the judgment being appealed". (PB 15) It is not the Second Circuit, but the State of Texas itself, that has "severed" security from "the judicial process". It has done so by deliberately creating a scheme in which the judgment loser is entitled to *no* judicial process on "the issue of arranging security pending appeal" and in which full, unsupervised discretion on that issue is placed solely in the hands of private judgment winners.

[37] If it were otherwise, there could never be a Section 1983 suit brought in the federal courts because there is in every state a court of general jurisdiction that can adjudicate constitutional claims in original actions. Certainly, no one would contend that a state official has not exercised state power because a state court could subsequently hear a claim—or has actually made a determination—that he exercised that power unconstitutionally. *Monroe v. Pape*, 365 U.S. 167 (1961). The result should be no different here. Pennzoil, through its exercise of state power, has done nothing that state law forbids; it has done only what state statutes and rules, which are "obviously the product of state action", expressly authorize. *See Lugar*, 457 U.S. at 922.

strates why, contrary to Pennzoil's assertion, the ruling below does *not* support the proposition that a private party's mere "invocation of state judicial proceedings" constitutes state action (PB 16): Pennzoil was a state actor because it could exercise state power without the "invocation of" *any* judicial process at all. Finally, the presence of those elements explains why Pennzoil is wrong in claiming that the "court of appeals ruled that every state-court judgment winner becomes [a state actor] whenever there is any prospect that the state's judgment enforcement machinery will actually be engaged" (PB 8): the state action holding rests on the fact that Texas has ceded to Pennzoil unsupervised public power which may be used—indeed, which Pennzoil attempted to use—to assume control over property that remains *in dispute*.[38] By contrast, upon final judgment after exhaustion of all appeals, a private party's use of judgment enforcement machinery against property no longer in dispute cannot be characterized as unsupervised.[39]

B. The Second Circuit's Decision Does Not Affect The Anti-Injunction Act.

Pennzoil contends that the Second Circuit's holding so expands the Section 1983 exception to the Anti-Injunction Act, 28 U.S.C. § 2283, that it "drastically erodes", indeed "cannibalize[s]", the Act. (PB 15-16)

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[38] Pennzoil also overlooks the fact that state action arising from invocation of a local security scheme can support a Section 1983 claim only when (as in *Lugar* and here) that claim challenges the constitutionality of the particular scheme (either on its face or as applied). Because of this required nexus, the state action ruling below does not permit Section 1983 attacks on state court judgments (PB 15) and, therefore, does not affect—far less (as Pennzoil charges) "completely obliterate"—the distinction between private and state action (PB 14).

[39] Pennzoil misconstrues the point of this Court's observation in *Lugar* that its holding was "limited to the particular context of prejudgment attachment". 457 U.S. at 939 n.21. (PB 13) The point of that observation, as its context reveals, was to distinguish the joint private/governmental action involved in an attachment scheme from a private party's "mere invocation of judicial proceedings". The critical "limit[ing]" factors in *Lugar's* state action holding are that a private party is exercising *unsupervised* control of *governmental* power to appropriate *disputed* property—and not whether such appropriation occurs prior to or after completion of the initial phase of adjudication.

In fact, the limited state action ruling below has no impact on the coverage of the Anti-Injunction Act. That ruling allows a private party to be deemed a state actor only where he can control the actions of ministerial state officials. Those ministerial officials are themselves unquestionably "state actors" who can be enjoined by a federal court in a meritorious Section 1983 case. The ruling below, therefore, can apply only where the state action element of a Section 1983 claim is necessarily already present whether or not the private party is himself considered a state actor. Accordingly, the Second Circuit's ruling does not exempt any federal claim from the Anti-Injunction Act that is not already exempt.[40]

C. The Second Circuit's Decision Is Well Within The Fairness Policies Underlying The State Action Doctrine.

As the discussion above demonstrates, the imposition of state action responsibility on Pennzoil was both appropriate and consistent with *Lugar*. With respect to the fairness concerns underlying the state action doctrine, the instant case, far from "expand[ing]" *Lugar* (PB 13), is significantly narrower than *Lugar* itself.

First, this is an injunction action, not a suit for damages. As the *Lugar* dissent noted, it may be unfair to impose damages under Section 1983 where the only conduct charged is a private party's innocent invocation of a seemingly valid state statute.[41] That concern, however, is not implicated where (as here) injunctive relief alone is sought. The only consequence of losing an injunction suit is that the federal defendant will be unable to make unconstitutional use of a state statute. Unlike a

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[40] Pennzoil's only response to this point is that, although Texaco could have sued a state official, it chose not to do so to avoid *Younger v. Harris*, 401 U.S. 37 (1971). (PB 16) By conceding that Texaco could have sued a state official, Pennzoil concedes that Texaco's Anti-Injunction Act analysis is correct—that, far from "eviscerating" the Act, the ruling below can have no effect on the Act's coverage. Moreover, Pennzoil's suggestion that the choice of federal defendant could have an impact on the applicability of *Younger*—or that the Second Circuit would have allowed *Younger* to be so easily avoided—shows a fundamental lack of understanding of the *Younger* doctrine. *See infra* at 24, *et seq.* Although a private party, Pennzoil was the decisionmaker under the state security scheme, and, therefore, was the most logical federal defendant.

[41] 457 U.S. at 956 n.14 (Powell, J., dissenting).

damages award, that is a "burden" to which the private party would be no less subject even if he were not a "state actor"—and even if state officials were, therefore, the only available defendants.[42]

Second, there concededly were other state actors who could have been named as defendants in the instant case, and, if Pennzoil had not been named, it undoubtedly would have fought long and hard to intervene and assume the very burdens of defense which would have resulted from its being named as a defendant in the first place. This demonstrates that, in the context of an injunction action like this one, a private party faces the same choices regarding the burdens of defense, whether or not he is deemed a state actor. That is obviously not true in a damages action, where if a private party is not named as a defendant he will have no reason to intervene.[43]

Third, in the instant case, the private party's invocation of state procedures would not have been wholly innocent or unwary. Pennzoil repeatedly disclaimed the need for security for its Judgment,[44] and was certainly aware that application of the lien and bond provisions would have had an irrevocably destructive impact on Texaco. Hence, Pennzoil's only plausible reason for resorting to the local security provisions would have been to preclude appellate review. That fact readily distinguishes this case from others in which the private party

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[42] Pennzoil asserts that it is "astounding" to suggest that this case is narrower than *Lugar* because it is " 'solely an injunction action, not a suit for damages' ". (PB 16) According to Pennzoil, the Anti-Injunction Act "has restrained federal power ever since 1793 precisely because *injunctive* interference in state proceedings is the *most* intrusive form of federal invasion". (*Id.*; emphasis in original) Pennzoil misses the point. With regard to the comity concerns underlying the Anti-Injunction Act, the state action holdings in *Lugar* and this case stand on equal footing—neither permits an injunction to issue which would not otherwise have been permitted. *See supra* at 21-22. In contrast, with regard to the distinct concerns that arise where state responsibility is sought to be attributed to a private party, *Lugar*—a damages action—may have an intrusive impact that this case does not have.

[43] For the same reason, any possible award of attorney's fees against a losing federal defendant in the kind of injunction action presented here is different from a damages award.

[44] *See supra* at n.13. Indeed, as mentioned, in state court pleadings filed *after* this Court noted probable jurisdiction, Pennzoil continued to disclaim the need for security.

invokes a "seemingly valid statute" wholly unaware that an infringement of rights may result.

In sum, the instant case offers no reason to reassess this Court's state action doctrine.

III. The Second Circuit Correctly Held That *Younger* Abstention Is Not Warranted.

Pennzoil contends that the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), precludes the limited relief granted below. *Younger* and its progeny stand for the proposition that ordinarily a federal court should not (a) interfere with a pending state judicial proceeding (by preventing a state adjudicator from completing deliberations properly begun), where (b) the subject matter of the proceeding implicates a "vital" or "important" state interest and (c) the federal plaintiff has a timely and adequate opportunity to have his federal claims adjudicated in the pending state suit. Where those prerequisites for *Younger* abstention are not present, "federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them".[45] None of the prerequisites is present here.

A. The Narrow Relief Below Does Not Enjoin An Ongoing State Judicial Proceeding Affecting A "Vital" Or "Important" State Interest.

The limited relief below has not interfered in any way with Pennzoil's underlying state court tort action against Texaco. After Texaco secured federal relief, Pennzoil's state suit continued through denial of Texaco's new trial motion and the filing and submission of Texaco's appeal from the Judgment in the Texas Court of Appeals. That appeal is now *sub judice*.

Nor is any state interest—"important" or otherwise—implicated in Pennzoil's state suit. It is a purely private action between purely private parties regarding purely private alleged wrongs. Indeed, the State of Texas expressly represented to the Second Circuit that it "has no interest in the underlying [state court] action". (A34; Tex. Br. at 2)

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[45] *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 238-39 (1984).

The only interference even arguably caused by the federal injunction is with Pennzoil's threatened invocation of the Texas lien and bond provisions. However, that threatened invocation does not satisfy either the "pending judicial proceeding" prong of *Younger* or the "important" state interest prong.

First, the Texas lien and bond rules do not provide for *any* judicial process whatever. With regard to the need for security, the state has placed complete decisional authority, unsupervised by judicial officers, in the hands of private litigants. Under the lien and bond provisions, the Texas judiciary plays no role. There is *no* notice; there is *no* return date; there is *no* hearing.[46] There is, in short, *no* judicial process relating to security with which the federal injunction could interfere.[47]

Second, even if Pennzoil's unsupervised invocation of the lien and bond provisions could be deemed a state judicial proceeding for *Younger* purposes, it does not implicate the type of "vital" or "important" state interest necessary to trigger *Younger* abstention.

This Court's *Younger* decisions demonstrate what an "important" or "vital" state interest is and why no such interest is present here. In each case where an "important" or "vital" state interest was found, the state, through the exercise of its discretion, had concluded that public policy required that a state enforcement action be brought against the federal plaintiff; the state or an agency of the state was itself a party to that enforcement proceeding; and the proceeding was "quasi-criminal" in nature or involved public responsibilities or public welfare concerns that were being protected by the state as a party.[48] None of those factors is present here—where a purely

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[46] *Compare Trainor v. Hernandez*, 431 U.S. 434, 446 n.9 (1977) (in finding a state attachment to be a proceeding " 'pending' *in the state courts* within the *Younger* and *Huffman* doctrine", this Court relied upon the fact that "the attachment . . . contained a return date on which the parties were to appear in *court* and at which time [the state defendants] would have had an opportunity to contest the validity of the attachment") (emphasis in original).

[47] Through its Fed. R. Civ. P. 62 "stipulation", Pennzoil itself had to resort to federal law in an attempt to insert into the Texas security scheme the judicial process that Texas has deliberately chosen to exclude.

[48] For example, in *Trainor*, this Court emphasized that the state attachment proceeding was an "ongoing civil enforcement action . . . brought by the

private party in a purely private dispute has threatened to take advantage of a state security scheme for purely private reasons.[49]

Three other factors that are present here underscore the absence of any *Younger* interest. Unlike any other *Younger* case: (a) here the federal defendant has purported by "stipulation" to *waive* the local security provisions—the very provisions it asserts embody "vital" state interests (PB 20)—and replace them with *federal* procedures;[50] (b) here the only state that could arguably have an "important" interest in application of the local security provisions at issue—the State of Texas—was a party below but is neither an appellant nor a participant in this Court;[51] and (c) here it is the federal defendant who seeks to disrupt the state adjudicative process (by destroying Texaco's

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State in its sovereign capacity" to "vindicate important state policies such as safeguarding the fiscal integrity of [public-assistance] programs". 431 U.S. at 446. In *Moore v. Sims*, 442 U.S. 415 (1978), this Court pointed out that "the State here was a party to the state proceedings" and that "the temporary removal of a child in a child-abuse context" implicates "vital concerns" similar to those which have "determine[d] the applicability of *Younger-Huffman* principles as a bar to the institution of a later federal action" in other cases. 442 U.S. at 423. In addition, in both *Trainor* and *Moore*, this Court stressed the "eviscerat[ing]" impact on the overall state administrative scheme resulting from the breadth of the federal plaintiff's claims. *Trainor*, 431 U.S. at 439, 445-46; *Moore*, 442 U.S. at 426-28.

See also Ohio Civil Rights Comm'n v. Dayton Christian Schools Inc., 106 S. Ct. 2718, 2723 (1986) (Ohio Civil Rights Commission's enforcement of state laws prohibiting sex discrimination involves "a sufficiently important state interest to bring the present case within the ambit of the cited authorities"); *Juidice v. Vail*, 430 U.S. at 335 ("A State's interest in the contempt process . . . is surely an important interest. . . . [W]e think it is of sufficiently great import to require application of the principles of [*Younger* and *Huffman*]"); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982) (state bar disciplinary proceedings to enforce "the professional conduct of attorneys it licenses" are matters in which the state "has an extremely important interest").

[49] This case involves neither of the two levels of public decisionmaking (*i.e.*, an enforcement decision and an adjudicative decision) which, in this Court's other *Younger* cases, state law had interposed as screens against the potential misapplication of state power. In each of those *Younger* cases, federal injunctive relief threatened to interfere with both levels of public decisionmaking. The federal relief in the instant case interferes with neither.

[50] That purported waiver suggests that even Pennzoil does not believe that the local provisions evidence an "important" state interest. Nor can Texas have a "vital" state interest in application of the federal procedures.

[51] *See Diamond v. Charles*, 106 S. Ct. 1697, 1702-04 (1986).

right to a meaningful appeal) and the federal plaintiff who seeks to avoid that result.[52]

Pennzoil makes several arguments in an attempt to bring this case within the scope of *Younger*. None has merit.

As its lead argument, Pennzoil contends that if it is properly deemed a "state actor" for Section 1983 purposes, that by itself warrants federal court abstention. According to Pennzoil, "[i]f Pennzoil is to be deemed 'the state' for § 1983 purposes", that must be because it is "a surrogate wielding the *public* powers of the state", and "if the public powers of the state are in fact implicated, *Younger* concerns come into play *for that very reason*". (PB 18-19; emphasis in original) There are three fundamental flaws in this argument.

The first is that Pennzoil has the basic relationships reversed. The fact that, with regard to security, Pennzoil is "a surrogate" for the state is flatly *inconsistent* with there being any comity concern at all—far less the specialized concern with state adjudicative process that *Younger* is meant to protect. Pennzoil is "a surrogate" for the state because the decision on whether security is needed is made, not by the state judiciary, but solely by Pennzoil. Unlike the state judiciary, however, Pennzoil has *not*, as a condition to exercising that public power, subordinated its own private concerns to the broader public welfare. Pennzoil carries with it no presumption (like the state adjudicator) that its decisions will be detached and balanced, or that (like all state officials) its actions will be guided by the public interest and with due regard for constitutional norms.

The undisputed facts of this case show that the opposite is true. Pennzoil has used the power conferred upon it by the State of Texas not to vindicate the security policy underlying that delegation of power, but in an attempt to achieve a private litigation advantage not contemplated by the rules—*i.e.*, to coerce a settlement and preclude corrective review. That kind of unilateral exercise of public power for private purposes has never received the deference heretofore reserved for the deliberations of independent state adjudicators. It should not now.[53]

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[52] Thus, the traditional alignment of interests in *Younger* litigation is here reversed.

[53] *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 577-79 (1973). Pennzoil claims that the failure to accord its exercise of public power the same

The second flaw in Pennzoil's argument is illustrated by its "important" state interest analysis. Pennzoil asserts that the decision on "how best to adjust a generic statutory rule to unusual circumstances" embodies the type of "very significant interest" that *Younger* is meant to protect. (PB 21) But Pennzoil does not explain why, if Texas has a "very significant interest" in such "adjustment", it has, by abdicating state power, deliberately divested the state judiciary of the minimal discretion needed to enable the "adjustment" to occur and has placed the issue in the hands of a private party who has every incentive to block the "adjustment".

The third flaw in Pennzoil's argument stems from the assertion that "if the public powers of the state are in fact implicated, *Younger* concerns come into play *for that very reason*". (PB 18-19; emphasis in original) In all state judicial proceedings, "the public powers of the state are implicated". If that were sufficient to trigger *Younger*, the careful "state interest" inquiry made by this Court in each *Younger* case would be inexplicable. The "important" state interest requirement would be read out of the law and *Younger* would automatically apply to all state civil litigation—a consequence this Court has expressly said is "not remotely suggest[ed]" by its *Younger* decisions.[54]

Pennzoil next contends that to the extent *Younger* requires an "important" state interest, that interest is found here in the efficacy or collectability of private state court judgments. (PB 20) Again, Pennzoil's argument has three flaws.

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deference accorded public officials exercising that same power will have "the perverse result of making § 1983 a far more radical instrument for federal intervention against private litigants—who are at the margins of the policies of § 1983—than against the state officials who are the central focus of those policies". (PB 22) But where a private party has power to control its adversary's access to corrective review, the danger that such power will be abused is far *greater* than when state power is exercised by responsible state officials. There could be no better proof of that axiom than the present case. A private party acting in these circumstances lies, not at the "margins", but at the core of the policy of Section 1983, which is to prevent abuse of power "under color of state law". Such a private party would not be deserving of comity even if *Younger* had no pending judicial proceeding or "important" state interest requirements.

[54] *Moore*, 442 U.S. at 423 n.8.

The first arises from Pennzoil's misplaced reliance on *Juidice v. Vail*, 430 U.S. 327 (1977), which Pennzoil asserts demonstrates that a "privately-initiated" judgment debt collection procedure can itself supply the "important state interest" required to trigger *Younger*. (PB 20) More than any of this Court's *Younger* decisions, *Juidice* demonstrates why Pennzoil's theory is wrong.

The *Juidice* opinion could not have made it plainer that the focus of the Court's analysis—the "important" state interest involved there—stemmed from the state judiciary's use of the contempt process, and *not* from the particular private interest that contempt proceedings happened to serve.[55] The *Juidice* federal plaintiff "had ignored for a period of more than nine months every stage of the state-court proceedings in which he had been a defendant".[56] Contempt was the state's method of punishing him for his disobedience. The Court emphasized that the federal plaintiff had committed " 'an offense to the State's interest . . . as great as it would be were this a criminal proceeding' ".[57]

Pennzoil has confused the particular private interest that contempt in *Juidice* served with the state judiciary's use of the contempt process itself. If the collectability of private judgment

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[55] 430 U.S. at 335-36 & n.12. This Court in *Trainor*, 431 U.S. at 443-44, described the contempt proceedings in *Juidice* as "similar to state civil enforcement actions", such as the quasi-criminal action in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). *See also Moore*, 442 U.S. at 423 (*Juidice* involved "enforcement of contempt proceedings").

[56] 430 U.S. at 330. Prior to instituting a federal action, the federal plaintiff in *Juidice* had (a) defaulted on a loan; (b) failed to appear at the state court trial of the creditor's collection suit, thereby subjecting himself to a default judgment; (c) failed to challenge the judgment by appeal or otherwise; (d) refused to satisfy the judgment; (e) failed to respond to deposition subpoenas meant to enable the judgment creditor to locate his assets; (f) refused to appear when summoned by the state court to explain his refusal to respond to the deposition subpoenas; (g) refused to pay a fine imposed by the state court as punishment for his contempt in refusing to respond to the summons; and (h) was incarcerated and released upon payment of the contempt fine. *Id.* at 329-30.

[57] 430 U.S. at 336 (quoting *Huffman*, 420 U.S. at 604). It is, of course, clear why contempt proceedings implicate important state interests. The contempt power enforces the principle that dissatisfied litigants must challenge state judicial action by lawful process rather than through private disobedience. No principle is more central to the integrity of the state's judicial function, or to its sovereign status.

debts were in fact an "important" *Younger* interest, as Pennzoil claims, *Juidice* would have been the ideal case to articulate such an interest, given the state defendant's particularly egregious efforts there to evade satisfaction of a final judgment. This Court, however, did just the opposite. It described the judgment debt collection function as involving "purely private concerns", and it expressly contrasted the state's vital interest in contempt with those private interests (such as collection of judgment debts) in aid of which contempt may sometimes be invoked.[58]

The second flaw in Pennzoil's analysis is that if, for *Younger* purposes, an "important" state interest can be identified in the efficacy or collectability of judgments, there is no reason why such an interest would not also be identified in any other state court order. All federal injunctions issued pursuant to *any* exception to the Anti-Injunction Act carry the possibility of impact on the efficacy of state court decisions. To apply *Younger* automatically wherever such a possibility exists would (once more) erase the "important" state interest requirement.

The third flaw in Pennzoil's analysis is that, even if efficacy or collectability of private judgments were an "important" state interest for *Younger* purposes, it is an interest with which the result below does not interfere. Where, as here, the judgment creditor concededly has no need for security, an injunction against imposition of security will have no impact on the state scheme for securing and collecting judgments—far less, the "eviscerat[ing]" impact which this Court has noted as a basis for abstention in *Younger* cases involving "important" state interests.[59]

Pennzoil raises the spectre that under the Second Circuit's ruling, all "procedural and structural rules governing the judicial processing of private disputes" are "easy prey to federal collateral attack during on-going state court proceedings", since "invocation of state judicial proceedings" makes the state plaintiff a "state actor" and, according to the Second Circuit, *Younger* "is . . . inapplicable". (PB 22 n.11)

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[58] 430 U.S. at 336 n.12.

[59] *See Trainor*, 431 U.S. at 445-46; *Moore*, 442 U.S. at 427-28.

Pennzoil is wrong. Nothing below even remotely suggests that "invocation of state judicial proceedings" makes a private party a "state actor". To the contrary, it is only when (as here) the state removes discretion from the courts and places it in the hands of a private litigant that the latter can be considered a "state actor" for Section 1983 purposes and that the comity concerns which this Court has identified in the *Younger* line of cases cannot arise. Where there is a process by which state courts exercise discretion—as provided in the vast bulk of "procedural and structural rules governing the judicial processing of private disputes"—suing the private state court litigant will not provide a Section 1983 entree into the federal courts.[60]

Finally, the present case falls within the "extraordinary circumstances" exception to *Younger*. Pennzoil asserts that this "exception" applies only in situations involving "bad faith" or "harassment". (PB 32) According to Pennzoil, "[t]ypical examples" of such situations are state obscenity prosecutions "in which no conviction is hoped for and in which it is the prosecution in and of itself that constitutes a constitutionally cognizable injury to First Amendment rights". (PB 32 n.27)[61]

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[60] Nor will such an entree be possible by suing a state judicial officer. Until he acts—by exercising discretion—there will be no "state action" for Section 1983 purposes; and, until then, a claim of injury would ordinarily be too speculative to satisfy Article III. *O'Shea v. Littleton*, 414 U.S. 488, 493-99 (1974). Once the state judicial officer does exercise discretion, doctrines such as *Rooker/Feldman* and res judicata would come into play; direct review of the state court result would then generally have to be through the state court system and ultimately to this Court pursuant to 28 U.S.C. § 1257. *See infra* at n.95.

[61] Pennzoil reads the "extraordinary circumstances" exception too narrowly. After discussing the types of "extraordinary circumstances" identified by Pennzoil, this Court in *Younger* expressly recognized that "[o]ther unusual circumstances calling for federal intervention might also arise, but *there is no point in our attempting now to specify what they might be*". 401 U.S. at 54 (emphasis added). Subsequently, this Court stated that "*Younger* left room for federal equitable intervention . . . where there is a showing of 'bad faith' or 'harassment' . . . *or where there exist other 'extraordinary circumstances* in which the necessary irreparable injury can be shown *even in the absence of the usual prerequisites of bad faith and harassment.*' " *Trainor*, 431 U.S. at 442 n.7 (quoting *Kugler v. Helfant*, 421 U.S. 117, 124-25 (1975) (emphasis added)).

Furthermore, while Pennzoil asserts that the only thing that makes this case " 'unique' or 'extraordinary' " is "the size of the judgment" (PB 35), that ignores the facts that actually combined to create the exigencies here: the

Even under Pennzoil's artificially constricted view of the "extraordinary circumstances" exception, "bad faith" or "harassment" does exist here. Concededly having no need for security, Pennzoil insisted on strict application of the lien and bond provisions, with the objective of forcing Texaco to settle the underlying merits proceeding, thereby insulating the Texas trial court Judgment from any review at all. Although Pennzoil now argues that Texas procedural rules are sufficiently flexible to allow effective and timely constitutional challenge to the lien and bond provisions (PB 26-27), before the Texas courts it insisted that, in making a challenge, Texaco strictly adhere to local rules that Pennzoil surely knew would have delayed or totally blocked access to any relief.[62]

This is not the conduct of someone who is acting in good faith. This is not the conduct of a party seeking to advance the policies underlying the state security scheme. Rather, it is conduct no different from that of the state prosecutor in Pennzoil's hypothetical—both are using state statutes, not for their intended purposes, but to block the exercise of constitutional rights. The comity values Pennzoil invokes should not be employed in the service of such behavior.

B. Texaco Lacked An Adequate And Timely Remedy In The Local Forum.

Apart from its other prerequisites, in order to establish *Younger* abstention, Pennzoil must show that Texaco had "an opportunity to fairly pursue [its] constitutional claims in the

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conceded lack of need for and impossibility of security; the short period of time in which Texaco had to act before suffering irreparable harm to constitutionally protected rights; the lack of any identifiable or proven state procedural avenue by which to raise its constitutional challenge; and Pennzoil's own lack of cooperation, which exacerbated the situation.

[62] Indeed, Pennzoil is using this very appeal as a settlement tactic. On February 21, 1986, the day after the Second Circuit's decision, Pennzoil's chairman was reported in the *New York Times* as saying that "Pennzoil probably would not appeal the latest ruling". *New York Times*, Feb. 21, 1986, at D1, col. 6. On March 25, 1986, four days after Pennzoil filed its notice of appeal to this Court, its lead counsel, Joseph D. Jamail, was quoted in the *Wall Street Journal* as stating that "[a]ny banker that loans money to [Texaco] now is a lunatic". *Wall Street Journal*, Mar. 25, 1986, at 7, col. 1.

ongoing state proceedings".[63] That is a burden Pennzoil has not met.

Pennzoil begins its discussion of state remedies with two assertions, both of which are inaccurate. *First*, Pennzoil states that, when Texaco decided to raise its due process challenge, it was subject to no exigency but rather was immune from any harm for a period of "3½ months". (PB 23) According to Pennzoil, the Second Circuit "freely acknowledged" and "Texaco nowhere denies" this point. (PB 23, 28 n.18)

Pennzoil is wrong. When Texaco moved for emergency federal relief on December 17, 1985, it *then* stood on the brink of bankruptcy. The company's viability was *then* measurable—not in months —but in days (perhaps hours). Far from "freely acknowledging" that no harm could occur for "3½ months", the Second Circuit expressly recognized that drastic harm was imminent (A40).[64]

Second, Pennzoil asserts that the Second Circuit based its inadequacy of remedies conclusion on an assumption "that the Texas courts would, if asked, simply refuse to safeguard federal and state constitutional rights and would instead mechanically apply the supersedeas bond rule as written". (PB 31) Pennzoil condemns such "forecasts of futility" (PB 24-25 n.13) about the result on the merits of Texaco's constitutional challenge.

Pennzoil is wrong. The Second Circuit *never* assumed that the Texas judiciary would ignore federal law. To the contrary, as part of its examination of the adequacy of state remedies, the Second Circuit assumed that Texaco would *ultimately prevail* on

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[63] *Juidice*, 430 U.S. at 337. *See also Middlesex*, 457 U.S. at 432, 436 n.14 (the bar disciplinary hearings there "constitute[d] an ongoing state judicial proceeding", which distinguished the case from others "in which there was no ongoing state proceeding to serve as a vehicle for vindicating the constitutional rights of the federal plaintiff"); *Moore*, 442 U.S. at 425 ("[t]he pertinent issue is whether appellees' constitutional claims could have been raised in the pending state proceedings"); *Hawaii Housing*, 467 U.S. at 237 (*Younger* abstention requires that "federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests").

[64] The Second Circuit stated, for example, that "[*i*]*mmediately following entry of the Texas judgment* on December 10, 1985, Texaco . . . faced a serious crisis" (A10; emphasis added); that "if resolution of [Texaco's] claims is to be effective, prompt judicial action is essential; *time is of the essence*" (A35; emphasis added). *See supra* at 5 & n.10.

its constitutional challenge within the Texas state system. (A37-38) The basis for the Second Circuit's ruling was that, given the exigencies and immediate threat of Texaco's destruction—and given the lack of cooperation by Pennzoil (A35-36)—there was substantial uncertainty about whether there was a procedural scheme in Texas that could provide *timely* relief, in a situation where uncertainty could not be tolerated. (A35-38)[65] That ruling, based on a full record relating to local procedures and the exigencies of the situation, is plainly correct.

Analysis of the adequacy of local remedies must begin with the central fact that, due to the deliberate decision by Texas to remove judicial supervision from the lien and bond provisions, the security scheme itself provides *no* process—adequate or otherwise. Under *Trainor v. Hernandez*, the inquiry need go no further. There, having determined that the two threshold requirements of *Younger* had been satisfied, this Court confronted the question whether the federal plaintiffs' constitutional challenge to the state attachment scheme could be raised and timely adjudicated "in the pending attachment proceeding"—*i.e.*, at the court hearing noticed for a return date in the attachment.[66] Because there was sharp disagreement on the issue, which was "heavily laden with local law", and because (unlike in the present case) the issue had not been addressed by the lower court, this Court remanded for assessment of the remedies question.[67]

On remand, the federal district court found that the purpose of state judicial supervision over attachment appeared to be limited to testing the truth of the factual allegations supporting the attachment, that there was no appeal as of right from an order of the lower state court and that there was no

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[65] This Court has repeatedly emphasized that "a necessary predicate for a *Younger* dismissal" is " 'the opportunity to raise and *have timely decided* by a competent state tribunal the federal issues involved' ". *Huffman*, 420 U.S. at 594 (emphasis added) (quoting *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973)).

[66] 431 U.S. at 446 n.9, 447 n.10. Although the attachment was collateral to a simultaneously instituted merits proceeding, on the question of adequacy of remedies this Court looked only to the attachment scheme *itself* (which —as here—was the target of the federal injunction).

[67] 431 U.S. at 447 & n.10.

"assurance of a prompt hearing" in the state appellate courts.[68] Those facts made state adjudication of the federal plaintiffs' constitutional claims "unlikely" and "'more theoretical than real'", and left the federal plaintiffs without "an 'adequate' state forum".[69] This Court summarily affirmed.[70]

The importance which *Trainor* placed on whether there was adequate process within the security scheme itself—or within established appellate channels as of right—demonstrates the appropriate context in which the *Younger* remedies inquiry is made. Without a clear and established procedural avenue within the proceeding then pending, the state defendant must engage in a time-consuming effort of trial and error as it searches for an adequate alternative route. Where time is of the essence—as it plainly was here—this Court has never required the federal plaintiff to bear the burdens of uncertainty inherent in such procedural experimentation.

It would have been especially inappropriate to impose those burdens on Texaco in the instant case. When Texaco was required to decide where to raise its due process challenge, it acted subject to the following constraints. *First*, Texaco knew that the Texas security scheme made no provision for process of any kind—adequate or otherwise—to challenge the state's money judgment security requirements.[71] *Second*, Texaco knew

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[68] *Hernandez v. Finley*, 471 F. Supp. 516 (N.D. Ill. 1973), *summarily aff'd mem. sub nom. Quern v. Hernandez*, 440 U.S. 951 (1979).

[69] *Hernandez*, 471 F. Supp. at 519-20.

[70] *Quern v. Hernandez*, 440 U.S. 951 (1979). That this kind of significant "uncertainty" is equivalent to inadequacy of remedies is supported by this Court's citation to *Hernandez* in *Moore*, 442 U.S. at 425-26 n.9, and is driven home by federal equity practice under the Tax Injunction Act, 28 U.S.C. § 1341. The Tax Injunction Act bars federal relief where there is a "plain, speedy and efficient" remedy within the state court system. *Id.* This Court has held that an "uncertain" state remedy does not satisfy that standard. *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 625 (1946) (federal equity practice as codified in the Tax Injunction Act). If "uncertainty" establishes inadequacy in the Tax Injunction Act context, it does so even more compellingly in the present context. That is because the comity concerns there—management of the public fisc—are far greater than any comity concerns even arguably present here; and there time is rarely, if ever, "of the essence", while here time was clearly "of the essence".

[71] That makes this an even clearer case than *Trainor*, in which there was at least a judicial hearing contemplated within the local attachment scheme—and, therefore, at least an argument that a state avenue existed for adjudication of the federal plaintiffs' constitutional claims. Here, in contrast, the state security scheme provides for no such judicial hearing.

that there was critical uncertainty as to whether, upon entry of the Judgment, the trial court presiding over the merits proceeding retained the power to grant relief.[72] *Third*, Texaco knew that, in view of the deliberate decision by the State of Texas that the judiciary should *not* play a role in determining security for money judgments, any search for an alternative procedural route (always uncertain and never required in this context by this Court) would be a hunt for an avenue that, by definition, was being considered for a novel and unintended use. *Fourth*, Texaco knew that, far from receiving the "cooperation of Pennzoil", Pennzoil could be expected (given its behavior up till then) to oppose any novel use of procedures and to raise any available barrier, however technical, to increase the uncertainty and pressure upon Texaco. *Fifth*, Texaco knew that it had at best a few days before the forces impelling it towards bankruptcy overtook its efforts to locate an appropriate procedural avenue.

It was also in these circumstances that the federal district court, through the exercise of its equitable discretion, decided

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[72] Once the trial court signed the Judgment, its jurisdiction was limited. *See* Tex. R. Civ. P. 329b(e). There is, for example, no Texas authority that would have permitted a constitutional attack on the lien and bond provisions to be then made by motion or other pleading in the pending proceeding. Indeed, cases suggest that it could not have been. *See, e.g., Rocha v. Ahmad*, 676 S.W. 2d 149, 154 (Tex. App.—San Antonio 1984, writ dism'd w.o.j.); *Santa Rosa Medical Center v. Robinson*, 560 S.W. 2d 751, 759 (Tex. App.—San Antonio 1977, no writ); Tex. R. Civ. P. 22, 682. The only procedural route, free from grave doubt, for making such an attack would have been by commencement of an original action.

Moreover, there is no Texas authority which would have permitted the Texas Attorney General to intervene in the pending proceeding after entry of the Judgment. Again, cases suggest that the trial court would not then have had power to permit intervention. *See, e.g., Comal County Rural High School Dist. No. 705 v. Nelson*, 158 Tex. 564, 314 S.W.2d 956, 957 (1958); *Helton v. Kimbell*, 621 S.W.2d 675 (Tex. App.—Fort Worth 1981, no writ). However, notice and an opportunity for the Attorney General to be heard are prerequisites under Texas law to a constitutional challenge to a state statute. Tex. Civ. Prac. & Rem. Code § 37.006(b) (formerly Tex. Rev. Civ. Stat. Ann. art. 2524-1 §11); *Estate of Ross*, 672 S.W.2d 315 (Tex. App.—Eastland 1984, writ ref'd n.r.e.), *cert. denied*, 105 S. Ct. 1844 (1985); *Commissioners Court of Harris County v. Peoples Nat'l Util. Co.*, 538 S.W.2d 228 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.); Tex. Rep. Br. at 3 n.1.

The procedural route upon which Pennzoil insisted at the time—that any attack on the collateral security provisions be part of Texaco's new trial motion (*see supra* at 6)—would have run up against these same problems. In addition, given the exigencies of the situation, Texaco did not have the time properly to prepare such a motion—a litigant ordinarily has 30 days to make a motion for a new trial. Tex. R. Civ. P. 329b. Despite the motion's considerable complexity and importance—most error not identified therein is

that emergency relief should be provided.[73] That decision should be disturbed only if it was *then apparent* that there was an established Texas procedure which would have allowed adjudication (acceptance *or* rejection) of Texaco's federal claim in timely fashion. That is, the inquiry here should not be whether, after eleven months of examination, Pennzoil can now identify a route within the Texas system that might conceivably have worked. Instead, the proper question is whether a route could have been located *within a matter of days or even hours* whose efficacy was at that time reasonably clear.[74]

After eleven months, even Pennzoil has been unable to locate any such procedural avenue. There is still not, after all the time Pennzoil has looked at the problem, a procedure whose efficacy is not subject to substantial question.

State mandamus provides a good example. Had Pennzoil chosen to dispute Texaco's factual showing of lack of need or irreparable harm (something that could not have been known beforehand), the Texas appellate courts would have had no

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waived, Tex. R. Civ. P. 324(b)—Texaco would have had to prepare and file its motion within hours or days, thereby creating a serious risk that appellate points of error would be waived. Then, presumably, Pennzoil would have been given an opportunity to respond and Texaco would have had to request and receive a hearing from the trial court. Finally, under Texas law, the motion could have sat unresolved for up to 75 days after entry of the Judgment, when it would have been overruled by operation of law, Tex. R. Civ. P. 329b(c)—which, in fact, is what happened here.

[73] Indeed, the federal courts in the instant case went beyond the inquiry made in *Trainor* (which, as mentioned, was confined to the state attachment scheme alone (*see supra* at n.66)) and examined the possibility of relief in the pending merits proceeding as well (which in *Trainor* was not explored as a prospective remedial avenue).

[74] The "stipulation" offered by Pennzoil *after* Texaco had instituted its federal suit (A129-30) does not make a difference. The "stipulation" in fact demonstrates that Pennzoil itself believed that there was *no* pre-existing procedural avenue available to Texaco under Texas law.

In addition, as the Second Circuit found, even after the "stipulation" was put forth by Pennzoil, it did "not solve the problem Texaco face[d] in this action". (A48) *First*, the "stipulation" was a mere tactic. During those few tense days in mid-December 1985, when Pennzoil knew that Texaco's existence hung in the balance, Pennzoil insisted that Texaco rigidly adhere to local rules. It was only *after* Texaco had received the protection of a federal temporary restraining order that Pennzoil abruptly changed course and, far from insisting on rigid adherence, purported to oust local rules and replace them with the federal standards of Fed. R. Civ. P. 62.

(Footnote Continued)

power to issue a writ of mandamus. Mandamus lies only when the facts are undisputed.[75]

Given the above *de jure* limitations on mandamus, the Second Circuit would have been justified in ending its inquiry at this point. However, the court did not do so. Instead, it assumed that the Texas courts would entertain the federal constitutional claim and would ultimately rule in Texaco's favor. Even under this assumption, the court concluded that the timeliness of state relief was uncertain.[76]

The additional remedies identified by Pennzoil in its brief to this Court are no better. They are wholly unavailable for discretionary relief from security requirements for money judgments and are even more uncertain than mandamus as vehicles for a constitutional challenge.

Second, the "stipulation" was expressly subject to the trial court's "accept[ance]" (A130)—something uncertain at best, given the fact that acceptance would have required the trial court to act contrary to (a) the intent of the Texas legislature and Supreme Court in removing judicial discretion on security, and (b) the state's interest (which Pennzoil itself has located in the Texas scheme) in eliminating the time and expense of holding individualized hearings on the question of security (PB 49).

Third, after being pressed by the district court at the hearing on Texaco's preliminary injunction motion, Pennzoil counsel finally conceded that, even were the parties to proceed in Texas under the "stipulation", Pennzoil would insist on a bond equal to "the full amount of the judgment". (Transcript of Hearing, Jan. 9, 1986, at 64; *see also* A48)

As a result, the "stipulation" simply added to the financial and business community's justified apprehension and confusion over Texaco's continued viability. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 371-72 n.10 (1982) (the fact that a settlement agreement remains subject to court approval creates sufficient uncertainty to prevent mootness); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 465 n.3 (1978) ("tentative nature of settlement" prevents mootness).

[75] *Donald v. Carr*, 407 S.W.2d 288, 292 (Tex. Civ. App.—Dallas 1966, no writ); *see also Johnson v. Hughes*, 663 S.W.2d 11, 13 (Tex. App.—Houston [1st Dist.] 1983, no writ). In addition, as the Texas Attorney General described mandamus before the Second Circuit, mandamus will not be granted unless the applicant has "a *clear right* to the performance of the act requested" and the target of the writ has "a *clear duty* to perform the act". (Tex. Br. at 32 n.10; emphasis added) To the extent that a "clear right" existed here, it was the "right" of Pennzoil, under the mandatory provisions of Rule 364(b), to execute on Texaco's assets absent a supersedeas bond in the full amount of the Judgment; and to the extent a "clear duty" existed, it was the "duty" of the Texas courts not to grant a stay of execution absent such a bond.

[76] Texaco would have had to "expend precious time" asking the Texas trial court for relief (A37; *see also Donald*, 407 S.W.2d at 291)—relief which,

1. Tex. R. Civ. P. 365(b)

Pennzoil first asserts that, under Tex. R. Civ. P. 365(b), "Texaco could have sought a stay of the judgment directly from the Texas Court of Appeals *without filing any supersedeas bond*". (PB 28; emphasis in original) This claim is based on the dubious assumption that Rule 365(b) confers the very discretion that Rule 364(b) eliminates (that is, discretion to consider whether, in a money judgment case, a bond in the amount of the judgment, interest and costs is excessive).

Not surprisingly, the express terms of the rules make clear that Pennzoil's assertion is wrong. Rule 365(b) gives the appellate courts power to review a bond for excessiveness where the bond has been "fixed by the trial court". However, under Rule 364—the general grant of authority for supersedeas bonds—only certain specified bonds are (or can be) "fixed by the trial court".[77] None is a bond for a *money judgment*. Accordingly, bonds for *money judgments* do not fall within the category of those which the appellate courts, under Rule 365(b), may "review for excessiveness".[78]

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because the Judgment had already been entered, the trial court had doubtful power to provide, and therefore could not have had "a clear duty" to grant. *See supra* at nn.72 & 75. Indeed, the Texas Attorney General conceded below that it was "most likely" that *any* trial court—even one of general jurisdiction—would have denied Texaco relief from the security provisions which "the highest court of the state" had made mandatory. (Transcript of Argument, Feb. 11, 1986, at 61-62) Texaco would then have had to file a mandamus petition with the Texas Court of Appeals; if successful on that petition, it would have had to defend a mandamus by Pennzoil to the Texas Supreme Court; if successful there, it would have had to engage in remand proceedings in light of the appellate ruling (including determination of the appropriate amount of security, *Burgher v. Chrisman*, 604 S.W.2d 536 (Tex. Civ. App.—Dallas 1980, no writ)); and if unsuccessful, it would have had to petition this Court for relief under 28 U.S.C. § 1257. (A38) Texaco simply did not have the time to follow such an uncertain procedural route. Moreover, it is worth noting in this connection that neither mandamus nor any other extraordinary writ was even suggested in *Hernandez* to be an adequate remedy.

[77] Rule 364(c) (judgment "for the recovery of land or other property"); Rule 364(d) (judgment "for the recovery of or foreclosure upon real estate"); Rule 364(e) (judgment "for the recovery of or foreclosure upon specific personal property"); Rule 364(f) (judgment "for other than money or property or foreclosure"); Rule 364(h) (judgment in favor of the state or a state agency where "no monetary damages can be shown").

[78] Significantly, Rule 365(a)—which permits appellate review of bonds for "insufficiency"—is not limited to bonds "fixed by the trial court". In

Man-Gas Transmission Co. v. Osborne Oil Co.[79] (PB 29) is not to the contrary. Pennzoil fails to mention that the judgment there included not only money damages but injunctive relief as well. The trial court required a corporate surety on the bond to supersede *both* parts of the judgment.[80] The appellate court struck the corporate surety requirement. However, since under Rule 365(b), the appellate court clearly had power to review the bond as to the injunctive part of the judgment, *Man-Gas* does not support the proposition that the court acted pursuant to power to review a money judgment bond.[81]

2. "Vested" Power

Pennzoil next asserts that the trial court is " 'vested' with the power 'to grant a temporary injunction to prevent damage to an appellant', when enforcement of a civil judgment would render the right to appeal 'meaningless' ". (PB 29) To support

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particular, since a money judgment bond must be "at least" the size of the judgment, interest and costs, Texas has created a procedural channel for the trial winner to obtain review of whether such a bond satisfies that minimum amount.

[79] 693 S.W.2d 576 (Tex. App.—San Antonio 1985, no writ).

[80] It had power to do so because Rule 364(f) provides that a bond to supersede an injunction shall be "fixed" by the trial court. Were it not for the injunctive relief in *Man-Gas*, the trial court would have had no involvement with the bond—and hence no opportunity to impose a requirement constituting a predicate for appellate review. In fact, the language from *Man-Gas* which Pennzoil quotes comes from *Mudd v. Mudd*, 665 S.W.2d 128 (Tex. App.—San Antonio 1983, no writ), which holds that Texas courts have no discretion with regard to money judgment bonds.

[81] Contrary to the representation in Texaco's Motion to Affirm, Pennzoil asserts that it "is simply not so" that to make an application in the Texas Court of Appeals under Rule 365(b) in mid-December 1985 would have required Texaco to waive its new trial motion. (PB 28 n.19) If Texaco is wrong, so is the Texas Attorney General, who stated in his Reply Brief to the Second Circuit that an "accelerated appeal, pursuant to Tex. R. Civ. P. 389a, would have cut short—eliminated—Texaco's opportunity to make [a new trial] motion". (Tex. Rep. Br. at 10 n.8) Whether Pennzoil or the Texas Attorney General be correct, their disagreement illustrates the degree of uncertainty inherent in searching for procedural avenues where none is specified in the rules. Moreover, even if Pennzoil were correct, it would not change the fact that Rule 365(b) does not permit an appellate court to review a money judgment bond for excessiveness; nor would it change the fact that no Texas case has ever held a money judgment bond in the amount of the judgment, interest and costs, to be excessive; nor would it change the fact that Rule 365(b) confers no power on the appellate courts to review the attachment of liens (which can be imposed even if a supersedeas bond is not posted).

this "vested" power theory, Pennzoil cites dictum from a single case—*Pace v. McEwen* ("*Pace* II").[82] (PB 29)

Pennzoil's reliance on the *Pace* II dictum is misplaced. The controversy underlying *Pace* generated two proceedings. In the first, the plaintiff obtained a money judgment which was affirmed on appeal ("*Pace* I").[83] *No* bond was posted and *no* stay of execution was granted. However, in Texas, the "Homestead" provision of the Texas Constitution insulates a judgment debtor's residence from execution,[84] and in *Pace* I, the judgment debtor's sole asset available to satisfy the money judgment was his residence.[85] Thus, during pendency of the appeal in *Pace* I, it was the "Homestead" provision—not any judicial stay of execution—that made execution on the judgment impossible.

After the money judgment in *Pace* I became final (upon exhaustion of appeals), the judgment creditor proceeded under Tex. Rev. Civ. Stat. Ann. art. 3827a for a declaration that the judgment debtor's residence was not exempt from execution under the "Homestead" provision and could be sold to satisfy the money judgment. The trial court ruled that the "Homestead" provision did not apply, and issued a "turnover" order compelling transfer of the debtor's residence to the local sheriff for public sale. It was this "turnover" order that was stayed by the appellate court in *Pace* II.

Pace II, therefore, had nothing to do with the power of Texas trial courts to stay a money judgment pending appeal in the absence of a full supersedeas bond. Rather, it concerned an appellate court stay of an order directing the disposition of specific real property in satisfaction of a money judgment that had already become final. Contrary to Pennzoil's assertion (PB 29 n.20), *Pace* II did *not* implicate Rule 364(b).

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[82] 604 S.W.2d 231 (Tex. Civ. App.—San Antonio 1980, no writ).

[83] 574 S.W.2d 792 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

[84] Tex. Const. art. XVI, § 50.

[85] *Pace v. McEwen*, 617 S.W.2d 816, 818 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

Despite its "vested" power theory, Pennzoil is unable to find a *single* Texas case where the mandatory requirements of Rule 364(b) have been suspended by any court pending appeal from a money judgment. None exists.[86]

3. Tex. Civ. Prac. & Rem. Code § 65.013

Pennzoil's third claim is that, under Tex. Civ. Prac. & Rem. Code § 65.013, "a Texas trial court has *explicit statutory power* to 'stay a judgment' if the complainant can show himself 'equitably entitled to be relieved against' part or all of that judgment". (PB 29; emphasis in original)

As a threshold matter, Section 65.013 is not relevant here because, in its constitutional challenge to the lien and bond provisions, Texaco does not seek " 'to be relieved against' part or all of th[e] judgment".[87] Moreover, there is no Texas case that would have permitted Texaco to make a Section 65.013 challenge prior to the time the Judgment had become enforceable (and the trial court had lost jurisdiction)—*i.e.*, January 10, 1986, at the earliest. *See supra* at 3. Once the trial court lost jurisdiction, any Section 65.013 challenge would have had to be by original action.[88] And no *Younger* case would require a federal plaintiff to seek relief on his federal claims by commencing an original action in the state courts—that would erase *Younger's* adequate remedy test.[89]

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[86] Indeed, *Kennesaw Life and Acc. Ins. Co. v. Streetman*, 644 S.W.2d 915, 916-17 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (decided *after Pace* II), expressly reaffirmed the mandatory character of Rule 364(b).

[87] Pennzoil asserts that the 1984 amendments to Rule 364(a) broadened the scope of Section 65.013 and rendered all cases which pre-date the amendments "utterly irrelevant". (PB 29-30) Pennzoil is wrong. According to the Supreme Court Advisory Committee, the amendments made no substantive changes with respect to those parts of the rule at issue here. Minutes, Advisory Committee for the Supreme Court of Texas, Nov. 12-13, 1982, p. 293, excerpted in Appendix C.

[88] Section 65.013 requires the complainant to show himself equitably entitled to relief "in his petition". Tex. R. Civ. P. 22 provides that a "petition" is the vehicle by which a civil suit "shall be commenced".

[89] *See supra* at n.63. Indeed, as Pennzoil itself concedes, a party with a constitutional claim under Section 1983 which he can prosecute as a *plaintiff* in "an original matter" may, under *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), and *Monroe v. Pape*, 365 U.S. 167 (1961), "choose to bring a federal action rather than sue in state court". (PB 5)

4. Inherent Equitable Power

Pennzoil asserts that "[i]f the supreme law of the land requires that Rule 364 be modified as applied to these facts, then a trial court of general jurisdiction certainly has the power to do so, and mandamus would certainly lie to compel that course of action". (PB 31 n.23)

Pennzoil's argument—that if there is a constitutional violation, there *must* be inherent equitable power in the state court system to prevent it—would (again) render irrelevant the inadequate remedy inquiry. Whether or not a state court might find a creative way of circumventing established procedural limitations so as to provide relief in the exigent circumstances of a particular case, the risk of predicting whether that will be done (or hoping that it will) is hardly one which *Younger* places on state court litigants. If it were, the discussion of adequacy of state remedies in all of this Court's *Younger* cases would have been unnecessary. Under Pennzoil's approach, *Trainor* would never have been remanded and, despite the finding of inadequate state remedies on remand, would have been summarily *reversed* not summarily affirmed.[90]

Pennzoil's position, when reduced to its essence, is that Texaco was required to bear the burden of uncertainty and delay within the Texas state court system—no matter how crushing the result. Pennzoil has failed to identify any established route the efficacy of which can reasonably be said to have

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[90] Citing *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 106 S. Ct. 2718 (1986), Pennzoil asserts that it is "a dubious premise" to assume that "Rule 364's bond requirement is mandatory and a trial court cannot fruitfully be asked or ordered to act beyond its statutory discretion". (PB 30-31 n.23) Pennzoil misunderstands the point this Court was making.

Dayton Christian Schools arose out of an inquiry by the Ohio Civil Rights Commission into a charge of sex discrimination. In the passage relied upon by Pennzoil, this Court made the point that even if a direct constitutional attack on the Ohio sex discrimination statute could not be made during the Commission proceedings, it had to be assumed that if a finding of discrimination in a particular case would violate the Constitution, the Commission would exercise its discretion against finding discrimination. In contrast, here there is no assumption to be made that in setting security, the state courts will be guided by constitutional requirements, because the state courts do *not* set security. 106 S. Ct. at 2724. In addition, the kind of exigency present here did not exist in *Dayton Christian Schools*. *Id.* at 2725-26 (Stevens, J., concurring). As a result, even appellate state court relief there, which existed as of right, would have been timely and sufficient. *See also Moore*, 442 U.S. at 433-35.

been clear and ascertainable in the circumstances in which Texaco was required to act. Pennzoil would put on Texaco the risk of choosing among a "procedural labyrinth",[91] where no particular avenue was clearly right, each appeared clearly wrong and even a single incorrect choice would have had disastrous consequences. Such a risk-shifting rule is not now—and should not become—the law.

IV. The Second Circuit Correctly Held That The Federal Courts Have Subject Matter Jurisdiction Over Texaco's Due Process Claim.

Relying principally on this Court's decisions in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), Pennzoil argues that, so long as Texaco could have made its due process challenge to the lien and bond provisions in the Texas state courts, the federal courts are "without [subject matter] jurisdiction" to consider that claim. (PB 42) Nothing in *Rooker* or *Feldman* (or any other case Pennzoil cites) supports Pennzoil's contention.

Rooker and *Feldman* stand only for the unremarkable proposition that the lower federal courts lack jurisdiction to engage in *appellate* review of state court determinations, such power residing exclusively in this Court by virtue of 28 U.S.C. § 1257. The underlying basis for the *Rooker/Feldman* doctrine is simply that it would be destructive of a dual judicial system to permit the lower federal courts to sit in judgment on state court decisionmaking.[92] The *Rooker/Feldman* doctrine excludes from

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[91] *Marino v. Ragen*, 332 U.S. 561, 565 (1947) (Rutledge, J., concurring).

[92] The claims in *Rooker* and *Feldman* illustrate this principle. In *Rooker*, the federal plaintiff asked the federal court to find "null and void" a contract which the Indiana Supreme Court had already upheld. 263 U.S. at 414. In *Feldman*, applicants for admission to the District of Columbia bar, whom the highest court there had determined in a judicial proceeding to be ineligible, asked the federal court to order the District of Columbia appellate court to allow them to take the bar examination or admit them to practice. 460 U.S. at 486. *See also Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286, 293 (1970) (the federal plaintiff is asking the federal courts to "decide that the state court judge was wrong"—that is, is "seek[ing] appellate review of a state decision in the Federal District Court"—in contravention of this Court's exclusive jurisdiction "to review on direct appeal the decisions of state courts").

the subject matter jurisdiction of the federal district courts claims or issues which have already been raised and determined by a state court or which can be decided only by directly reviewing the merits of a state court decision.[93]

Because, in the instant case, Texaco's due process claim in no way required direct review of any state court determination, the Second Circuit correctly held that *Rooker/Feldman* was inapplicable.[94] Pennzoil makes three arguments in an effort to reverse that result. None has merit.

First, Pennzoil contends that Texaco's constitutional claim is in fact "inextricably intertwined" with the state court Judgment. (PB 41)

As explained above, however (*see supra* at n.93), under *Feldman*, constitutional claims are "inextricably intertwined" with local court decisions when, although not raised in or decided by the local court, they can be decided only by directly reviewing the local court's determination.[95] That is not true here.

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[93] In *Feldman*, this Court explained that the latter type of claim or issue, although not actually decided by a state court adjudication, is nonetheless outside federal district court jurisdiction because it is "inextricably intertwined" with the state court adjudication. 460 U.S. at 486-87 & n.18. This Court also emphasized that a federal claim (there, a facial attack under the Due Process Clause on certain District of Columbia bar admission rules) which neither was raised in the local proceeding nor required a direct review of the local decision, would fall within federal district court jurisdiction—although resolution of the claim might nullify the result of the local proceeding. *Id.* at 486-87. As this Court indicated, the availability of such a claim in the federal courts is not a matter of subject matter jurisdiction, but instead turns solely on the res judicata effect of the local determination. *Id.* at 487-88 & n.19. Under the Full Faith and Credit Statute, a federal court may accord a local determination no greater preclusive effect than local law permits. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); *Migra v. Warren City School Dist.*, 465 U.S. 75, 81 (1984).

[94] The short-lived and uncertain prohibition against enforcement contained in Paragraph 7 of the Judgment did not constitute a state court determination. As the Second Circuit noted, Paragraph 7 was simply the product of a "consent" agreement between Pennzoil and Texaco. (A7) Moreover, the Second Circuit did "not view the terms of the [federal] preliminary injunction to be contrary or inconsistent with those of Par. 7 of the Texas judgment, which remain in force and must be obeyed until they expire". (A48)

[95] This includes not only determinations on the *merits* in state court actions, but also "procedural and structural" determinations during the course of state court litigation (*e.g.*, discovery orders, evidentiary rulings, scheduling

Texaco's due process attack upon application of the lien and bond provisions was not—and could not have been—raised in the Texas trial court as a basis for reversal of the Judgment (A23); nor does resolution of the claim require direct—or, indeed, any—review of the Judgment (A27).[96] Consequently, even if Pennzoil were correct that the result below has an impact on the Judgment, *Feldman* makes plain that there would be no subject matter bar. In fact, however, Texaco's due process challenge could *never* place the efficacy or collectability of the Judgment in doubt, since the challenge is dependent upon *both* lack of need for security *and* irreparable harm if security is required.[97]

Second, Pennzoil claims that under *Rooker/Feldman* "[i]t is axiomatic that only the court rendering a judgment, and the courts with jurisdiction to hear appeals from that judgment, have power to process such appeals, including power to review

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orders, etc.) which might form the basis of an appeal from the judgment for the losing state court litigant. Thus, Pennzoil is wrong in arguing that the Second Circuit result "would permit piecemeal shopping trips to federal fora on other procedural and structural issues that can readily be labeled 'collateral' and made the basis of supposedly independent causes of action under § 1983". (PB 44) Where there is state court discretion to rule on those "procedural and structural" issues (there was none here), there will be "case or controversy" and "state action" barriers to a federal challenge before that discretion is exercised. *See supra* at n.60. And once the discretion is exercised, there will be a *Rooker/Feldman* barrier to challenging the result in federal court rather than state court.

Brown v. Chastain, 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970); *Ganey v. Barefoot*, 749 F.2d 1124 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 3484 (1985); *Hale v. Harney*, 786 F.2d 688 (5th Cir. 1986); and *Thomas v. Kadish*, 748 F.2d 276, 282 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 3531 (1985) (PB 39 n.36, 41 n.39) illustrate this point. In all those cases, the federal court lawsuit advanced claims that sought reversal of a prior state court decision.

[96] Pennzoil asserts that an injunction against enforcement of the Judgment is "a determination that itself cannot be made without evaluating the state court judgment". (PB 42) But that is disproved by the Second Circuit's opinion itself. To the extent the district court purported to comment on the merits of the Judgment, the Second Circuit ruled that "[t]his procedure was clearly erroneous and impermissible as a matter of law". (A47) Far from tailoring security to an assessment of the merits of the Judgment, the Second Circuit stated that "equitable principles" (*i.e.*, the conceded fact that Pennzoil has no need for security) "may have justified a bond in a lesser amount" than that set by the district court (A47-48).

[97] Thus, Pennzoil is also wrong in asserting that because "the [Texas] judicial system is not free even to consider enforcing or securing" the

and correct procedural barriers that are said to limit the value of those appeals—whether by issuing a stay or otherwise". (PB 37)

Pennzoil misconstrues the result below. The lower courts did not act in aid of the appellate jurisdiction of the Texas courts—or of any other court. They acted to preserve Texaco's constitutional rights—the right to be free from the irrational withdrawal of a meaningful appeal. Pennzoil's argument reduces to this: that any ruling which has the result of preserving a litigant's ability to present a claim to a state court is necessarily a ruling in aid of the state court's jurisdiction—and, therefore, a ruling which only the state court possessing such jurisdiction can make. Pennzoil is wrong. Federal courts cannot be divested of jurisdiction to hear claims of deprivation of constitutional rights under color of state law—claims falling within their "original jurisdiction" under 28 U.S.C. § 1343(a)(3)—merely because resolution of those claims might have an impact on state courts. Indeed, it is precisely because Section 1983 was intended to allow impact on state courts that it was deemed an exception to the Anti-Injunction Act.[98]

The critical distinction between action in aid of jurisdiction and action to preserve individual constitutional rights is illustrated by comparing the instant case to one involving an application to this Court for a stay of enforcement pending appeal. In the latter situation, the Court, acting pursuant to its "potential" appellate jurisdiction,[99] would make a preliminary assessment of the merits of the lower court result to determine

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Judgment, it "is a judgment in name only". (PB 42) Nothing that the federal courts have done has in any way affected the merits of the Judgment, which is now on appeal in the state courts. Once the appellate process is completed (including review by this Court, if appropriate), the federal injunction will expire, and, based as it is on a showing of lack of need for security, the injunction cannot possibly interfere with Pennzoil's ability then to collect the Judgment (assuming the Judgment has not been reversed).

[98] *Mitchum v. Foster*, 407 U.S. 225 (1972). Pennzoil would in fact doubly expand the *Rooker/Feldman* doctrine. Under Pennzoil's view, the *Rooker/Feldman* subject matter bar would extend beyond federal claims that directly review state court judgments (as *Feldman* requires), to reach (a) claims that merely have an impact on state court judgments (expressly included *within* federal subject matter jurisdiction by *Feldman*) and (b) claims that have no impact on state court judgments, but merely might affect the state appellate system (not even considered by *Feldman* as a conceivable basis for a subject matter bar).

[99] *Atlantic Coast Line R.R. Co.*, 398 U.S. at 296.

the likelihood of plenary review and reversal.[100] That is an inquiry the Second Circuit did *not* undertake here.[101]

Third, Pennzoil contends that, even if the result below is neither "inextricably intertwined" with the state court Judgment nor in aid of state appellate jurisdiction, the Second Circuit "nevertheless erred in not directing the district court to impose an exhaustion requirement on Texaco's challenge to the Texas lien and bond provisions". (PB 42) Pennzoil purports to find this "exhaustion" requirement by "prob[ing] beneath the surface [of *Rooker/Feldman*] for the principles of comity that provided the substructure for what this Court held". *Id.*

There is nothing in the "substructure" of *Rooker/Feldman* (whatever that means) to support the result urged by Pennzoil. The basic principle underlying those cases is that the federal judiciary cannot act to oust state courts of their appellate power. Ouster can occur in two ways. *First*, a federal court might attempt to review the merits of a state court judgment. But, as we have shown, that did not happen here. *Second*, a federal court might attempt to reverse a state court decision arising from invocation of ancillary state processes designed to set security pending appeal. But, as we have shown, the Texas security scheme provides for no such processes. Thus, nothing that Texaco or the lower courts have done is contrary to the principles which Pennzoil supposedly locates in the *Rooker/Feldman* "substructure".[102]

Indeed, if anyone here is acting contrary to those principles, it is Pennzoil itself. For it is Pennzoil that has attempted

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[100] The nature of the inquiry is illustrated by Justice Blackmun's analysis in *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1319, 1330 (1975) (Blackmun, J., in chambers) (cited by Pennzoil at PB 38 n.34) ("there is a significant possibility that this Court would grant plenary review and reverse"). *See also Barefoot v. Estelle*, 463 U.S. 880, 895 (1983); *see generally* Stern, Gressman & Shapiro, *Supreme Court Practice* 693-94 (6th ed. 1986).

[101] The Second Circuit made *no* determination as to whether this Court —or, for that matter, the Texas Supreme Court—would hear Texaco's appeal from the Judgment and *no* assessment of Texaco's likelihood of success on the merits of that appeal. (A41) As mentioned above, the Second Circuit's discussion of the "non-frivolous" nature of the issues raised by Texaco in its state court appeal related only to the question of whether Texaco had established irreparable harm. *See supra* at n.22.

[102] Moreover, the lack of a timely and adequate state court remedy (*see supra* at 32 *et seq.*) would defeat any *Rooker/Feldman* (or Full Faith and Credit) claim, even if (contrary to fact) such a claim otherwise had merit.

to use state security provisions to oust state courts from the exercise of appellate power. It is Pennzoil that has attempted to use doctrines supposedly protective of state appellate power as a means of destroying that power. In so doing, Pennzoil has, as the Second Circuit correctly held, turned "settled law" on its head. (A21-22)

CONCLUSION

In the abstract, the choice between enabling individual litigants to vindicate federal rights in a federal forum and deferring to state court systems in the interests of comity and federalism is not an easy one. One can readily imagine (and Pennzoil in its brief does) hard cases in which these two important interests are in conflict. This is not such a case.

Pennzoil was awarded a Judgment in Texas of unprecedented size, which the two states supplying the applicable law—New York and Delaware—have represented was based upon fundamental trial court error. The size of that Judgment, coupled with the prospect that it would immediately be enforced by liens and execution, would have deprived Texaco of its state-guaranteed right to meaningful appellate review by forcing Texaco's liquidation or bankruptcy before its appeal could be heard. The lien and bond provisions were not necessary to protect the collectability of the Judgment. Pennzoil was threatening to invoke them merely to coerce a settlement and avoid any appellate review.

Further, the local security scheme provided no judicial process by which Texaco could have made any challenge to the security requirements. Nor was there a procedural route in Texas, free from grave uncertainty regarding its utility for making a constitutional attack on the security provisions, in a situation where one wrong choice by Texaco would have been disastrous. At the same time, Pennzoil insisted that the Texas trial court strictly apply local rules and opposed any novel use of procedures, knowing that the result would be to make state relief either impossible or too late. The trial court adopted that inflexible approach. It was only then, with time running out, that Texaco moved for emergency injunctive relief in the

federal district court. And, despite its intransigence in the Texas court, Pennzoil abruptly switched gears before the federal court and purported to "waive" the local security provisions—which it claims embody an "important" state interest—and replace them with federal law.

In sum, there is in this case not a single comity factor weighing on the side of federal abdication of jurisdiction, while there is a compelling need to vindicate Texaco's constitutional claim. For the reasons presented above, this Court should affirm the result below.

Respectfully submitted,

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APPENDIX A

Rule 329b. Time for Filing Motions

The following rules shall be applicable to motions for new trial and motions to modify, correct, or reform judgments (other than motions to correct the record under Rules 316 and 317) in all district and county courts:

(a) A motion for new trial, if filed, shall be filed prior to or within thirty days after the judgment or other order complained of is signed.

(b) One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed.

(c) In the event an original or amended motion for new trial or a motion to modify, correct or reform a judgment is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.

(d) The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.

(e) If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

(f) On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rules 316 and 317, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power had expired.

(g) A motion to modify, correct, or reform a judgment (as distinguished from motion to correct the record of a judgment under Rules 316 and 317), if filed, shall be filed and determined within the time prescribed by this rule for a motion for new trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial. Each such motion shall be in writing and signed by the party or his attorney and shall specify the respects in which the judgment should be modified, corrected, or reformed. The overruling of such a motion shall not preclude the filing of a motion for new trial, nor shall the overruling of a motion for new trial preclude the filing of a motion to modify, correct, or reform.

(h) If a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed, but if a correction is made pursuant to Rules 316 or 317 after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment.

APPENDIX B

Rule 364. Supersedeas Bond or Deposit

(a) May Suspend Execution. Unless otherwise provided by law or these rules, an appellant may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, or making the deposit provided by Rule 14c, payable to the appellee in the amount provided below, conditioned that the appellant shall prosecute his appeal or writ of error with effect and, in case the judgment of the Supreme Court or Court of Appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages as said court may award against him.

(b) Money Judgment. When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs.

(c) Land or Property. When the judgment is for the recovery of land or other property, the bond or deposit shall be further conditioned that the appellant shall, in case the judgment is affirmed, pay to the appellee the value of the rent or hire of such property during the appeal, and the bond or deposit shall be in the amount estimated or fixed by the trial court.

(d) Foreclosure on Real Estate. When the judgment is for the recovery of or foreclosure upon real estate, the appellant may supersede the judgment insofar as it decrees the recovery of or foreclosure against said specific real estate by filing a supersedeas bond or making a deposit in the amount to be fixed by the court below, not less than the rents and hire of said real estate; but if the amount of said supersedeas bond or deposit is less than the amount of the money judgment, with interest and costs, then the appellee shall be allowed to have his execution against any other property of appellant.

(e) Foreclosure on Personal Property. When the judgment is for the recovery of or foreclosure upon specific personal property, the appellant may supersede the judgment insofar as it decrees the recovery of or foreclosure against said specific personal property or by filing a supersedeas bond or making a deposit in an amount to be fixed by the court below, not less

than the value of said property on the date of rendition of judgment, but if the amount of the supersedeas bond or deposit is less than the amount of the money judgment with interest and costs, then the appellee shall be allowed to have his execution against any other property of appellant.

(f) Other Judgment. When the judgment is for other than money or property or foreclosure, the bond or deposit shall be in such amount to be fixed by the said court below as will secure the plaintiff in judgment in any loss or damage occasioned by the delay on appeal, but the court may decline to permit the judgment to be suspended on filing by the plaintiff of a bond or deposit to be fixed by the court in such an amount as will secure the defendant in any loss or damage occasioned by any relief granted if it is determined on final disposition that such relief was improper.

(g) Child Custody. When the judgment is one involving the care or custody of a child, the appeal, with or without a supersedeas bond or deposit shall not have the effect of suspending the judgment as to the care or custody of the child, unless it shall be so ordered by the court rendering the judgment. However, the appellate court, upon a proper showing, may permit the judgment to be superseded in that respect also.

(h) For State or Subdivision. When the judgment is in favor of the State, a municipality, a State agency, or a subdivision of the State in its governmental capacity, and is such that the judgment holder has no pecuniary interest in it and no monetary damages can be shown, the bond or deposit shall be allowed and its amount fixed within the discretion of the trial court, and the liability of the appellant shall be for the face amount if the appeal is not prosecuted with effect. The discretion of the trial court in fixing the amount shall be subject to review. Provided, that under equitable circumstances and for good cause shown by affidavit or otherwise, the court rendering judgment on the bond or deposit may allow recovery for less than its full face amount.

(i) Certificate of Deposit. If the appellant makes a deposit in lieu of a bond, the clerk's certificate that the deposit has been made shall be sufficient evidence thereof.

APPENDIX C

Excerpt from Minutes, Advisory Committee for the Supreme Court of Texas, Nov. 12-13, 1982, p. 293

This rule has to do with supersedeas bonds, and there's some textual changes, but the only thing of substance [concerns a different subdivision of the Rule].